

Tentative Proposals for Reform of The Matrimonial Property Act

Saskatchewan

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Acknowledgement

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Tentative Proposals for
Reform of The Matrimonial Property Act

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan
September, 1984

The Law Reform Commission of Saskatchewan was established by An Act to Establish a Law Reform Commission proclaimed in November, 1973, and began functioning in February of 1974.

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* * * * *

The Law Reform Commission Act.

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

* * * * *

N o t e

This report contains proposals for a new Matrimonial Property Act. The Commission emphasizes that the proposals are tentative only, and invites comments and criticisms from the public. A final report to the Minister of Justice will not be issued by the Commission until the public has had an opportunity to comment on the proposals.

The report is divided into two parts. The first part discusses major policy issues, and highlights changes in matrimonial property law recommended in the report. The most important proposals are listed at the end of the introduction to the first part. The second part consists of the proposed Act, together with a section-by-section commentary. The commentary discusses the legislation in greater detail.

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MATRIMONIAL PROPERTY:
ISSUES AND TENTATIVE PROPOSALS

I. INTRODUCTION AND SUMMARY OF TENTATIVE PROPOSALS

Most people today regard marriage as a partnership. Whether the marriage is one in which the wife is a full-time homemaker and mother, or an arrangement in which both spouses work and contribute to the care of the children, married people in Saskatchewan usually expect to share both the obligations and the benefits of their joint undertaking.¹

It is because marriage is regarded as a partnership that the decision of the Supreme Court in the 1975 case of Murdoch v. Murdoch² produced a strong public reaction. In that case, Mrs. Murdoch had made a substantial contribution to the operation of a farm, doing not only those things normally expected of a farm wife, but also taking primary responsibility for management of the farm during her husband's illnesses. But since the title to the land was in the husband's name, technically all the profits earned from the farm belonged to him, and payments on the mortgage were attributed to him. Therefore, the Supreme Court of Canada

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See the discussion of changing attitudes towards marriage in the report of the Royal Commission on The Status of Women in Canada, Ottawa, 1970, 225-230.

² [1975] 1 S.C.R. 423.

held that although Mrs. Murdoch was entitled to maintenance she could claim no interest in the farm when her marriage was dissolved.

Chief Justice Laskin dissented from the majority opinion. He took the position that the indirect contribution of a farm wife might create a "constructive trust" that would give the wife an interest in the property. Even the majority of the judges ruled as they did only because they could find no basis for departing from accepted doctrines of property law. Mr. Justice Martland reiterated a statement made in an earlier case:³

If a presumption of joint assets is to be built up in these matrimonial cases, it seems to me that the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion...⁴

Public reaction made the legislative reforms suggested by the court almost inevitable. Most provinces responded quickly with remedial legislation. In Saskatchewan, section

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Thompson v. Thompson, [1961] S.C.R. 3, per Judson, J, at 14.

⁴ Murdoch v. Murdoch, supra, footnote 2, at 432.

22 of The Married Women's Property Act⁵ was amended in 1975 to permit the court to take into consideration the indirect contributions of both spouses on a division of matrimonial property. The amendment was intended to be only a stopgap measure, pending a comprehensive examination of matrimonial property law. The Matrimonial Property Act was enacted in 1979,⁶ and proclaimed in force at the beginning of 1980.

Section 20 of The Matrimonial Property Act provides that:

The purpose of this Act...is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses and that inherent in the marital relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the matrimonial property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.

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S.S. 1974-75, c. 29. It should be noted that the Law Reform Commission of Saskatchewan, in its Tentative Proposals for Reform of Matrimonial Property Law Third Working Paper, October, 1974, recommended this as an interim step. Subsequently the Commission published Proposals for a Saskatchewan Matrimonial Homes Act, May, 1976, which recommended legislation that would provide co-ownership of the matrimonial home. This report was never implemented.

⁶ S.S. 1979, c. M-6.1.

The sections that follow implement the ideas contained in section 20.

Section 23 of the Act creates certain exemptions relating to property acquired before marriage. As a general rule, the value of such property at the time of marriage is exempt from distribution, but the court retains a discretion to override the exemption in appropriate cases.

Section 21 provides a general rule for distributing property acquired during marriage between the spouses. It establishes a presumption of equal sharing. In other words, it is assumed at the beginning of the inquiry that the spouses each contributed directly or indirectly to the acquisition of property during marriage, and are therefore entitled to share the property equally. The presumption of equal sharing can be rebutted. Subsection 21(2) sets out seventeen grounds upon which the court can conclude that equal sharing would be unfair. In effect, the court has a broad discretion to depart from equal sharing.

Section 22 of the Act sets up a special rule for division of the matrimonial home. Under the Act, the matrimonial home, which includes up to a quarter section of land, is presumed to be equally shareable between the

spouses even if it was brought into the marriage by one of the spouses. Moreover, the presumption of equal sharing is very strong in this case. Equal division can be departed from only if there is some "extraordinary circumstance" or it would be "unfair and inequitable to the spouse who has custody of the children" to make an equal division.

The Matrimonial Property Act went a long way towards removing the injustice inherent in the Murdoch decision. The Act gives full recognition to the indirect, often non-financial, contribution made by spouses during marriage. It would be surprising, however, if legislation as far-reaching and novel as The Matrimonial Property Act did not have some flaws. It was primarily for that reason that the Law Reform Commission was asked to begin its review of The Matrimonial Property Act shortly after it was proclaimed in 1980. The Commission began monitoring decisions under the Act in an attempt to identify problem areas as they were revealed by cases contested in the courts. In addition, the Commission has collected histories, briefs and other comments from members of the public concerning the Act.

Perhaps the most frequently criticized aspect of the Act has to do with exemptions. Most people agree that property acquired before marriage should be exempt in some fashion, but the manner in which that policy has been carried into effect in The Matrimonial Property Act has been a matter of considerable controversy. Under the Act, only the value at the date of marriage of property brought into marriage is exempt from distribution. This has been perceived as a problem because of the rapid increase of farmland values in Saskatchewan in the last few decades. Some observers believe that the increase in value of property brought into marriage should not ordinarily be subject to division in the same manner as property acquired after marriage. The partnership concept of marriage suggests that property that the spouses worked and saved to acquire during the course of their marriage ought to be subject to division.⁷ This rationale does not extend to property brought into the marriage without considerable modification. While there are circumstances in which

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The phrase "worked and saved to acquire during the course of the marriage" comes from a letter dated March 16, 1978 from Yvette Rousseau, President of the National Advisory Council on the Status of Women, to the then Attorney General of Saskatchewan.

property brought into marriage may become, at least in part, a partnership asset, it is difficult in most cases to justify division of inflationary increases in property value.

The problem with the exemptions policy is closely tied to another problem. A matrimonial property order can destroy the viability of a farm or business carried on by one of the spouses. If, for example, a farm is divided under The Matrimonial Property Act, the farming spouse must either transfer a share in the property to the other spouse, or pay a money judgment for the value of the other spouse's share of the matrimonial property. A property transfer may leave the farming spouse with too little property to carry on a viable farming operation; a money judgment may leave the spouse with a cash flow problem or an unmanageable debt load. It is possible under the Act to defer distribution by giving a non-farming spouse an interest in the property in the form of a mortgage secured against the land, but the courts have not always considered this alternative.⁸ While it is not practical or fair to delay distribution in all

⁸ For example, see Patron v. Patron (1981), 7 Sask. R. 366 (Q.B.).

cases, in the absence of a clearly articulated policy in favour of preserving viable farms and businesses, enterprises may be placed unnecessarily at risk by matrimonial property proceedings. The fact that a substantial part of the value of many farms is a result of the increase in land prices of property brought into marriage compounds this problem.

A more general criticism of the Act made by some observers concerns the role of contribution in the division of matrimonial property. The purpose clause of the Act recites the notion that it is the contributions of the spouses that entitle them to share matrimonial property. Yet the Act appears to preclude any consideration of the actual contributions of the spouses.⁹ It would not be appropriate to add up the contributions of each spouse, and divide property on that basis. This is because in a partnership - and marriage is a kind of partnership - there is an agreement to pool contributions and share proceeds without a fine calculation of the relative contributions of

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For example, see Howorko v. Howorko (1981), 6 Sask. R. 420 (U.F.C.). See also the general comments of the Supreme Court of Canada in Farr v. Farr, May 3, 1984, File No. 17661 (unreported).

each party while the partnership subsists. But where a spouse has substantially failed to make the contribution that would ordinarily be expected in the circumstances of the marriage, it can be argued that the understanding upon which the partnership was based has been eroded. In some cases, that spouse should not be entitled to rely on the partnership concept as the basis for an equal division of the matrimonial property.

Some provisions of The Matrimonial Property Act have produced conflicting judicial opinions. As a result, it is often difficult for lawyers and their clients to predict what the result of a matrimonial property application may be. This uncertainty is a problem in itself. It is usually desirable in any contested matter to attempt to negotiate a settlement rather than face the delay and expense of court proceedings. But negotiation is difficult if it is not possible to reasonably predict the decision that would be reached if the matter went to trial. Many of the complaints received by the Commission from members of the public concerning The Matrimonial Property Act focused on the expense of matrimonial property litigation. At least part

of the cost of litigation could be eliminated if the Act was more certain in its effect, permitting negotiated settlements in more cases.

The Commission's approach to reform of matrimonial property law is based on the concept of marriage as a partnership. For that reason, spouses should be entitled to share in the property that they have worked and saved to acquire during the course of the marriage. The Commission's proposals attempt to work out the consequences of the partnership notion in a more thorough manner than does the present Act.

Although a new Act is proposed, much of it is similar in content and structure to the present Act, and many portions of the existing legislation have been retained. The result might be described as a "second generation" Matrimonial Property Act; it does not so much reject the old Act as build upon it, taking advantage of the experience that has been gained in practice since the original Act was adopted.

SUMMARY OF TENTATIVE PROPOSALS

The major proposals incorporated in the draft Act are as follows:

1. The presumption of equal sharing of matrimonial property should be retained.

2. A substantial failure by a spouse to make the contribution that would ordinarily be expected of him or her in the circumstances of the marriage should be a consideration on which a court may base an unequal division; but otherwise the court ought not attempt to compare the relative contributions of the spouses.

3. Property brought into marriage by a spouse should ordinarily be exempt from division, including any increase in value unrelated to the efforts of the spouses.

4. Gifts and inheritances received by a spouse after marriage should be exempt from division unless it can be shown that a gift or inheritance was intended for both spouses.

5. The conduct of the spouses toward one another during marriage should not be a factor in dividing matrimonial property.

6. The material date for dividing matrimonial property should ordinarily be the date the spouses separated, with appropriate adjustments made for the use and appreciation of the property from that date until the date of the court order.

7. The courts should be directed to preserve economically viable farms and businesses, where it is fair and practical to do so, by ordering payments to be made over time or otherwise deferring distribution.

8. Pensions should be expressly included as matrimonial property, and the court should be empowered to impose a trust on or vest an interest in a pension plan, or divide the value of an interest in a pension plan according to a prescribed formula.

9. The Homesteads Act should be repealed, but the traditional homesteads concept should be modernized and integrated into Part I of The Matrimonial Property Act.

Other changes include new provisions respecting conflict of laws, dissipation, applications after death of a spouse, and contracting out of the Act.

II. THE HOMESTEADS ACT AND POSSESSORY
RIGHTS UNDER THE MATRIMONIAL PROPERTY ACT

The Matrimonial Property Act is primarily concerned with the distribution of property between spouses. Part I of the Act, however, recognizes the right of each spouse to possession of the matrimonial home and household goods. These rights exist regardless of which spouse has legal title to the home. They exist during the course of the marriage and are not dependent upon a court order. Such rights were recognized by law before the enactment of matrimonial property legislation;¹⁰ Part I of The Matrimonial Property Act codified and extended these rights.

Under the present Act, each spouse has an equal right to possession of the matrimonial home and household goods. The court may make an order granting exclusive possession of the matrimonial home to one of the spouses. The Act provides criteria for making such orders, and the courts have indicated a reluctance to make an order of exclusive possession where the marriage is still subsisting and the

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See Bouey v. Bouey (1973), 9 R.F.L. 129 (Sask. Dist. Ct.).

parties have been living together.¹¹

Part I of the present Act also protects a spouse's right to possession as against third parties. This protection is available only where one of the spouses has obtained an order of exclusive possession of the matrimonial home. The order may be registered in the land titles office, and when so registered it "binds the land" and prevents the other spouse from selling or encumbering it. A spouse who has obtained an exclusive possession order has a right to notice of any proceedings in respect of the property, may preserve the property by making mortgage payments, and is protected from execution against the property by the other spouse's creditors.

The right to register an exclusive possession order in the land titles office overlaps with the protections provided by The Homesteads Act.¹² Homesteads legislation, first enacted in 1915, requires that the wife consent to any transfer or encumbrance of the homestead. Thus a husband could not unilaterally put his wife out of possession of the

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Crites v. Crites (1980), 4 Sask. R. 239, (U.F.C.).

¹² R.S.S. 1978, c. H-5.

family home by transferring it to a third party. Nor could a third party foreclosing upon a mortgage take possession of the home unless the wife had consented to the mortgage.

The protections provided by The Homesteads Act, unlike the protections in Part I, are not dependent upon an exclusive possession order. In other respects the protections in Part I are more extensive.

Many of the problems inherent in the original Homesteads Act still plague the legislation. The Act inadequately defines what constitutes a "homestead".¹³ The nature of the homestead right, the effect of non-compliance with the consent requirement, and the effect of a homestead caveat remain far from clear.¹⁴

¹³ -----
The Homesteads Act does not define "homestead" but instead adopts the reference to "homestead" contained in The Exemptions Act, R.S.S. 1978, c. E-14.

¹⁴ In 1981, the case of Toronto-Dominion Bank v. Gordon (1981), 9 Sask. R. 133, was argued before the Saskatchewan Court of Appeal over the issue of the effect of non-compliance with the formalities required by The Homesteads Act. The reasons for judgment show that the issues involved are indeed complex. In 1983, the Court of Appeal again dealt with the effect of non-compliance in McClenaghan v. Haley (1983), 23 Sask. R. 212. Regarding homesteads caveats, it was settled only recently in Re Homesteads Act (1983), 21 Sask. R. 27 (Q.B.) that the right to maintain such a caveat lapses on divorce.

In addition, the legislation betrays its age. The Act gives protection to wives but not to husbands. It also prescribes an examination procedure that many people consider objectionable.

In summary, Part I of The Matrimonial Property Act created a systematic body of law governing the rights as between the spouses to possession of the matrimonial home and household goods. However, the protection of such rights against third parties is fractured between two Acts. Part I covers some of the same territory as The Homesteads Act, but the provisions of both Acts should be co-ordinated.

The proposed Act pursues three objectives:

- (1) to co-ordinate homesteads legislation with The Matrimonial Property Act;
- (2) to define "homestead" rights and the consequences of those rights; and
- (3) to modernize the homesteads concept.

The first of these objectives has been accomplished by integrating homestead rights and protections into Part I of the Act. Consequently, it is proposed that The Homesteads Act be repealed, and that the term "homestead" be assimilated in the concept of the "matrimonial home".

Incorporating the homesteads concept in Part I emphasizes that the homestead right is possessory in nature. The traditional homesteads concept of a consent requirement - in effect a veto power - has been retained. The protections against third parties - the right of a spouse to notice, the right to make mortgage payments and the protection from execution creditors - are no longer dependent on the existence of an exclusive possession order.

A major change is that "matrimonial home" has been defined so that a husband and wife can have no more than one matrimonial home at any given time. Under the present law, spouses may have any number of matrimonial homes or homesteads. The existing definitions of these terms were structured in this fashion in order to deal with anomalous cases. But the purpose of Part I is to recognize and protect possessory rights in the property that is the shelter and focal point of the family; there is no reason to protect former residences. Extending possessory rights to more than one property creates an unnecessary fetter on disposition of property. Although a family may spend time in two houses, they will almost certainly regard one of the houses as their real home.

The proposed Act introduces an intention test: the "matrimonial home" of cohabiting spouses is the residence that they regard as their principal place of cohabitation. If there is any doubt, either spouse may apply to the court to determine which property is the matrimonial home. In this way, the proposed Act is adaptable to the anomalous situations while avoiding the complications that arise if a multiplicity of matrimonial homes is possible.¹⁵

"Matrimonial home" has been redefined to include only the portion of the surrounding land that is necessary for the use or enjoyment of the home. Under the present Act, up to a quarter section (65 hectares) of surrounding land is included. Saskatchewan alone among the provinces includes what is essentially farmland in the definition of the matrimonial home. The historical reasons for defining a homestead as including the surrounding quarter section are no longer pertinent. Part I is concerned with protection of possession of the family home, and there is no justification for extending this protection to a parcel of farmland.

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For example, see Re Stevenson (1971), 20 D.L.R. (3d) 119 (Sask. Q.B.) in which the wife was allowed to avoid a sale by the trustee in bankruptcy of a property that had in the past been used as the homestead but which was no longer being used as the home.

Unlike the present homesteads legislation, the effects of non-compliance with the consent requirement are explicitly set out. If one spouse purports to transfer or encumber the matrimonial home without the consent of the other spouse, the transaction will not be registrable in the land titles office. Further, except where a purchaser or encumbrancer did not know that the property was a matrimonial home, the other spouse may have the transaction set aside by court order.

The concept of a matrimonial home caveat replaces the homesteads caveat. The proposed Act makes clear the nature and effect of the new caveat.

The homesteads concept incorporated in the proposed Act has been modernized in several respects. It applies to

husbands and wives equally.¹⁶ The traditional homesteads "examination" has been replaced by a form of consent to be completed by the husband or wife of the spouse who has title to the property. The consent must be accompanied by an affidavit of execution. The examination procedure is at present a source of inconvenience and expense, and probably provides little additional protection. The proposed Act dispenses with the consent requirement where spouses are co-owners of the matrimonial home. If spouses are joint tenants or tenants in common, the interest of a spouse cannot be made subject to a sale or encumbrance unless that spouse has duly executed the instrument. Execution of an additional form of consent would be superfluous.

Under the proposed Act, a spouse's consent to a dealing with the matrimonial home may be contained in a written agreement between the spouses. This is not possible under the present Homesteads Act. Another change is that a

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It is likely that the Canadian Charter of Rights and Freedoms will compel the equal application of the homestead protection upon the coming into force in 1985 of the guarantee of equality rights in section 15.

properly authorized committee or a person authorized by a power of attorney may on behalf of a spouse consent to a transaction.

The range of circumstances in which a court may dispense with the consent requirement has been broadened. The Homesteads Act specifically permitted a court to dispense with the consent of the wife in very limited circumstances. The court could also decline to set aside a transaction where it appeared that the wife had misled a purchaser into thinking that she had consented to the transaction.¹⁷ The proposed Act expressly allows the court to waive the consent requirement, either in anticipation of a transaction or after the transaction has been entered into. The wide grounds for dispensing with consent include an unreasonable withholding of consent by a spouse. In Daer v. Daer,¹⁸ a farmer was threatened with foreclosure proceedings, and had entered into an agreement for sale of the homestead and other property in order to bring the mortgage payments up to date. His wife refused to consent.

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This power was created by the court out of the doctrine of estoppel; the Act itself conferred no such power on the court. See McClenaghan v. Haley, supra footnote 14.

¹⁸ (1984), 31 Sask. R. 36 (Q.B.).

The court concluded, with regret, that it could not dispense with the consent even though it found that Mr. Daer was attempting to preserve the matrimonial property as best he could pending the matrimonial property application. The proposed Act would permit the court to dispense with consent in such circumstances.

Finally, it should be noted that Part I of the proposed Act contains a purpose section to recognize that:

[T]he matrimonial home is the shelter and focal point of the family, and that each spouse is entitled to security of possession of the matrimonial home and household goods.¹⁹

¹⁹ -----
Section 4 of the proposed Matrimonial Property Act, 1984.

III. DIVISION AND DISTRIBUTION OF MATRIMONIAL PROPERTY

A. The Presumption of Equal Sharing

A presumption of equal sharing of property acquired during marriage follows naturally from the notion that marriage is a partnership. Spouses rarely make an express agreement specifying their responsibilities during the marriage or the way in which the profits of their partnership will be divided. But marriage does create mutual expectations, and each spouse ordinarily assumes a mutually acceptable role in the relationship. While the marriage lasts, there is usually a tacit understanding that each spouse will play his or her assigned role, and that the fruits of their joint undertaking will be shared. Most spouses assume that marriage is a permanent relationship, and do not contemplate the financial consequences of separation or divorce until the marriage has failed. Because married people ordinarily rely on this assumption, extension of the expectations formed during marriage provides the fairest approach to division of matrimonial property in the absence of an express agreement to the

contrary. A presumption of equal sharing of assets acquired during marriage is an essential cornerstone of matrimonial property law.

There is also a very practical reason for starting from a presumption of equal division. Without it, the only way to divide matrimonial property would be to add up and compare the relative contributions of spouses to the partnership. In this context, "contributions" must mean much more than simply dollars and cents. What is the value of being a good parent? What price can be placed on emotional support? The difficulties inherent in comparing contributions to child care, household management and financial provision are obvious and insolvable.

The proposed Act therefore retains the presumption of equal sharing. Like the present Act, the proposed Act contains a purpose section:

The purpose of this Part is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of the spouses and that the contribution of the spouses to these responsibilities entitles each spouse to an equal division of the matrimonial property,

subject to the exceptions, exemptions
and equitable considerations mentioned
in this Part.²⁰

This section is substantially the same as section 20 of the present Act. The reference to "joint contribution, whether financial or otherwise" contained in the purpose section of the present Act has been deleted because the proposed Act defines contribution to include indirect and non-financial contribution:

"contribution" by a spouse means a contribution:

- (i) to the marriage or to the welfare of the family, including any contribution made as a homemaker or parent; or
- (ii) directly or indirectly to the acquisition, disposition, preservation, maintenance, improvement, operation or management of matrimonial property.²¹

The proposed Act retains the general approach to division of non-exempt property contained in the present Act. Property other than the matrimonial home is divided equally unless, having regard to factors enumerated in the

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Section 20 of the proposed Matrimonial Property Act, 1984.

²¹ Clause 19(a) of the proposed Matrimonial Property Act, 1984.

legislation, an equal division would be unfair. Nine such factors are contained in the proposed Act; the present Act lists seventeen. There are several reasons for this reduction.

First, several of the factors contained in the present Act have been dealt with elsewhere in the proposed Act. Such matters as the tax consequences of distribution, the effect of written agreements, and the relationship between property division and succession law are too important to be left as simply discretionary factors. Because, for example, tax consequences are mentioned in the present Act only in the list of factors, this issue has not always been considered when property is divided. Yet a matrimonial property order may require sale of property, attracting capital gains tax. An otherwise fair division is converted into a division weighted in favour of one spouse if no adjustment to take tax liability into consideration is made.

Second, a long list of factors is often self-defeating. Rather than guiding discretion, the long list will often create an unmanageable discretion; and almost inevitably some of the factors will be vague. The present Act, for example, directs the court to consider "the extent to which

the marriage has affected the earning capacity and financial means of a spouse".²² That factor has not been applied in any decision which has come to the Commission's attention. It is probably directed to situations where a spouse has worked in the home and not developed an income-producing career. However, it is because of the recognized contribution made by such a spouse that the Act establishes a presumption of equal sharing. Any detriment resulting from the role adopted by a spouse is properly a matter to consider in an application for maintenance, rather than division of property based on contribution.

The matrimonial home receives special treatment. Like the present Act, the proposed Act directs equal division of the home unless there is some "extraordinary circumstance" which would make it unfair to do so. "Matrimonial home" is, however, redefined. Under the proposed Act, the matrimonial home will include only that portion of the surrounding land that is necessary for the use and enjoyment of the home. Under the present Act, up to a quarter section of surrounding land is included. In many cases, a substantial part of the value of a farming operation is concentrated on

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Clause 21(2)(g).

the home quarter. The matrimonial home is afforded a special status because it is recognized as the focal point of the family. This rationale does not justify the division of farming assets under a special rule simply because they chance to be located close to the farm home. The definition in the present Act can, in fact, produce arbitrary results. If the home is not on the farm, but in a neighbouring village or town, the special rule for division of the home has far different consequences than where the house is on the home quarter. Not surprisingly, the courts have sometimes attempted to find a rationale to avoid dividing the entire home quarter as part of the matrimonial home.²³

B. Contribution

Absent from the list of factors to be considered in dividing property under the present Act is any direct reference to the contributions of the spouses. The actual contributions of the spouses are not considered relevant in determining whether to depart from equal distribution. The Act deems the contributions to be equal, and the issue is

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See the discussion under the heading "Property Brought Into Marriage", infra, at 48-49.

put to rest.²⁴ In Patron v. Patron, Mr. Justice MacLeod criticized this aspect of the legislation:

That in society as a whole there is an equal assumption of these responsibilities cannot be denied.

This average, or ideal, is deemed to be the invariable rule. It is a statutory bed of Procrustes in which each marriage is deemed to fit. It is immaterial that what is true of the average is not true of the individual. Proof that the parties did not assume the responsibilities equally is not a basis upon which the court is permitted to depart from equal distribution of matrimonial property.

The underlying intention of the Saskatchewan Act is that property of spouses will be available for distribution and that it be divided equally, without regard to any question of merits as between the parties themselves.²⁵

On the other hand, simply dividing matrimonial property according to the relative contributions of the spouses would not be appropriate. Consider two hypothetical cases. In

²⁴ Howorko v. Howorko (1981), 6 Sask. R. 420 (U.F.C.). See also the comments of Mr. Justice McIntyre of the Supreme Court of Canada in Farr v. Farr, May 3, 1984, File No. 17661 (unreported), who stated that "contribution to the growth of assets after the marriage is presumed to be equal and the proceeds therefrom to be equally divisible."

²⁵ (1981), 7 Sask. R. 366, at 371 (Q.B.).

each case, the spouses have agreed that one of them will be the family breadwinner, and the other will maintain the home and take primary responsibility for looking after the children. Assume that in each case the allocation of responsibilities is a fair one, and that in each case both spouses carry out their responsibilities well. However, the breadwinner in family #1 earns \$18,000.00 per year, while the breadwinner in family #2 earns \$36,000.00 per year. If we are somehow able to add up the relative contributions and value the other spouse's contributions to family #1 as equal to those of the income earning spouse, the matrimonial property should be divided equally. But the relative contributions of the other spouse in family #2 must then be less than equal to those of the income earning spouse in that family, so that on a strict relative contribution test, an unequal division would be called for. Yet it is likely that most people would think that the homemaker spouse in each family should receive the same percentage share of the matrimonial property.

It is sometimes suggested that the major problem in assigning a value to a homemaker's contribution is essentially a factual one: it is difficult to place a value

on the work done by a homemaker and parent, much less relate it to the matrimonial assets. No doubt this is a real problem, but there are other problems that run deeper. Assume that in family #1 it was possible to exactly determine the hours of work and types of duties undertaken by the homemaker spouse. It might then be possible to calculate exactly what it would have cost to replace those contributions with domestic help. But is that an appropriate measure of the value that spouse contributed to the marriage? Most people would agree that it is not.

Questions of matrimonial property must involve something more than the relative contributions of spouses. That additional element is the partnership concept.

In marriage, although the terms of the relationship are seldom expressly defined, the spouses do have mutual expectations, and each assumes an agreed upon role in the marriage. If spouses tacitly agree that one of them is to have responsibility for maintaining the home and caring for the children, while the other is to provide the family with financial security, it would seem fair to conclude that they intended to share equally the proceeds of their joint

undertaking. For that reason, the relative contributions of the spouses should not ordinarily be a factor for consideration in division of matrimonial property.

But if there has been a substantial failure on the part of one spouse to make the contribution to the relationship that would ordinarily be expected in the circumstances of the marriage, the fundamental basis of the partnership has been eroded. A spouse who fails to make any contribution to the marriage partnership should no longer be able to rely on the partnership concept in order to obtain an equal division of property. Departure from equal division of matrimonial property will then be justified. It would not be desirable, however, to make allegations of failure to contribute an issue in every contested case. If anything less than a substantial failure were relevant, there would be a danger that proceedings would become protracted and costly in too many cases. Where failure to contribute amounts to a fundamental breach of the marriage relationship, fairness demands that it should be considered. But consideration of contribution should be reserved for those exceptional cases.

In at least some cases, the courts appear to be moving toward this approach to contribution. For example, in Bernat v. Bernat, it was suggested that:

[I]f one spouse has abandoned his or her role in the marital relationship and has not made a contribution to the relationship, an argument for an unequal division of²⁶ matrimonial property could be advanced...

The proposed Act therefore permits the court to consider a spouse's failure to contribute to the marriage if that failure constitutes a substantial departure from the reasonable expectations of the spouses. This is accomplished by including the following factor to be considered in determining whether to depart from equal division:

a substantial failure of a spouse to make the contribution that would ordinarily be expected of that spouse²⁷ in the circumstances of the marriage.

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(1983), 26 Sask. R. 276 at 279 (Q.B.); see also Morrison v. Morrison (1984), 29 Sask. R. 102 (U.F.C.), where the wife of an alcoholic was awarded almost all of the matrimonial property because of the husband's failure to be of "any substantial support to his family".

²⁷ Clause 27(1)(a) of the proposed Matrimonial Property Act, 1984.

This will not open the door to arguments based on relative contributions, but it will give the courts sufficient flexibility to deal with exceptional cases where one spouse has abdicated his or her responsibilities in the marriage partnership.

C. Immoral or Improper Conduct

In dividing matrimonial property under the present Act, a court may not consider the misconduct of a spouse.

Section 25 provides:

For the purposes of making any determination under section 21, 22 or 23, no court shall have regard to immoral or improper conduct on the part of a spouse unless that conduct amounts to dissipation or has otherwise been substantially detrimental to the financial standing of one or both spouses.

Manitoba and Newfoundland expressly exclude misconduct not amounting to dissipation as a factor to be considered in division of matrimonial property.²⁸ In five other common law provinces, the list of factors to be considered in departing from equal division does not include conduct.²⁹ It has been argued that conduct may be considered under the Alberta legislation, since consideration of conduct is not expressly prohibited, and the court has a broad discretion to take into account "any fact or circumstance that is

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The Marital Property Act, C.C.S.M. c. M-45, s. 13(3); The Matrimonial Property Act, S. Nfld. 1979, c. 32, s. 21.

²⁹ British Columbia, Ontario, Prince Edward Island, New Brunswick and Nova Scotia.

relevant in dividing matrimonial property".³⁰ Conduct has not, however, been expressly considered in any reported Alberta decision.

The question of the significance to be attached to misconduct is a difficult one. Judicial decisions and public correspondence reviewed by the Commission did not provide clear guidance on this issue. The Commission proposes that no substantive change be made in the treatment of misconduct, but welcomes further public response. Alternative approaches to this question and some of the arguments supporting each approach are set out below.

The policy behind prohibiting consideration of conduct by the court dividing matrimonial property is not hard to determine. Division of matrimonial property is justified by the joint contributions of spouses to the marriage

³⁰ Matrimonial Property Act R.S.A. 1980, c. M-9, s. 8(m). In the text, Matrimonial Property Law in Canada, ed. Bissett-Johnson and Holland, Burroughs & Co. 1980, P.J. Lown, at A-22, notes that conduct of the spouses might be introduced under this clause, but thinks that it should be limited to cases "where it is obvious and gross to the point where it would be repugnant to a sense of justice to ignore it".

partnership. If contributions create a right to claim an interest in property, then misconduct is logically not a basis for reducing that entitlement. Misconduct is not ordinarily a reason for depriving a person of property that has been earned.

Fault is often difficult to assign when a marriage fails. Although a traumatic event such as the discovered infidelity of a spouse may be the catalyst that finally drives spouses apart, a spouse's misconduct may be more a symptom than a cause of marriage breakdown. There may be cases where one spouse is more to blame than the other, but sometimes a marriage simply does not work. It is for this reason that the trend in family law reform has been to minimize the importance of fault and the significance of "matrimonial offences".

If misconduct may be a reason for reducing a spouse's share of matrimonial property, how much of a reduction is appropriate? Opening the door to consideration of conduct could raise difficult questions.

On the other hand, because the presumption of equal sharing is premised on the mutual expectations of spouses in the context of the marriage partnership, misconduct might be

relevant to the division of matrimonial property. One of the mutual expectations is that both spouses will try their best to keep the partnership together. If a spouse unilaterally and without just cause engages in conduct that destroys the partnership, should that spouse be able to rely on the presumption of equal sharing? Responsibility can be placed solely on one spouse in only a small minority of cases when a marriage fails, but in those cases, it may be unfair to apply a statutory rule which makes misconduct or immorality irrelevant.

The breakdown of a marriage may cause economic hardship for both spouses. Marriage usually provides a more efficient economic unit than that enjoyed by single people generally. When spouses separate, expenses for shelter, transportation and entertainment can no longer be shared, so that the total cost to each spouse will increase. As well, division of farms or businesses may significantly reduce the overall income producing ability of those assets. It can be argued that the spouse whose conduct is responsible for injuring both spouses economically should bear the larger share of that injury. Again, however, responsibility cannot be readily assigned to one of the spouses in most cases.

A third possible approach represents something of a compromise. The present Act's prohibition against considering conduct could be retained in questions relating to the division of property. But conduct could be expressed to be relevant to questions relating to distribution, particularly where the court must decide whether to order an immediate cash payment to the applicant spouse or "defer" distribution by spreading payments over a number of years. A spouse whose misconduct caused the marriage breakdown may have little ground to complain if he or she is required to wait a number of years in order to realize a share of the matrimonial property. Conversely, if the conduct of the property-owning spouse was responsible for the collapse of the marriage, the court would be more likely to order a

distribution requiring an immediate liquidation of at least some of the property.³¹

D. Property Brought into Marriage

Under the present Act, not all matrimonial property is shareable. An exemption may be allowed for property owned by one spouse at the time of marriage. But this exemption is limited to the fair market value of the property at the time it was brought into the marriage. All increases in value are shareable. The exemptions provisions in the present Act have been the most controversial aspect of the legislation. An analysis of whether these exemptions provisions are appropriate or inappropriate should start by asking why there should be exemptions at all. The answer to this question can in turn be found by returning to the question of why matrimonial property should be shareable.

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This is the approach taken by the present Act in the limited context of possessory rights to the matrimonial home. Clause 7(b) permits the court to consider "the conduct of the spouses towards each other" in making an order of exclusive possession. This policy could be extended so as to include a consideration of conduct as a factor in deferring distribution on a division of property.

Matrimonial property is shareable because it is the product of the joint undertaking of the spouses. It follows that if property is not a product of the partnership, it should be exempt from division.

Property owned by one spouse at the time of marriage is in the usual case not a product of the joint undertaking of the spouses. A spouse who brings property into a marriage should be able to take that property out of the marriage.

Whether or not appreciation of exempt property is shareable should be decided by asking the same question that is asked about the property itself: Is it a product of the marriage partnership? Thus, if property that was brought into marriage has increased (or decreased) in value due to market forces and inflation alone, the appreciation (or depreciation) should not be divided between the spouses. But to the extent that an increase in the value of property can be attributed to improvements made after the marriage, the appreciation should be divided.

An exemptions rule that does not consider the effects of inflation may produce arbitrary results. In periods of low inflation the exemption will remain the same, but in periods of high inflation the exemption will quickly shrink.

Inflation does not create any increase in real value. No one benefits from an increase in value due solely to the diminished purchasing power of the dollar. To divide the "inflated value" simply decreases the exemption.

The practical significance of exemptions policy is underlined by the dramatic increase in the value of farmland in Saskatchewan in recent years. Between 1961 and 1981, the average value of farmland in the province increased by a factor of almost eight.³² A significant part of that increase has been due to the diminished value of the dollar.³³ A farmer who brought a parcel of land into marriage many years ago might today find the exemption under the present Act is perhaps one-tenth the value of the

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Statistics Canada Catalogue No. 21-003, "average value of farmland in Saskatchewan (including buildings) by crop district, 1949-81". The average price per acre of Saskatchewan farmland was \$37 in 1961. It increased in every year after that date, with the exception of the period 1968-72, and reached \$292 per acre in 1981.

³³ Between 1961 and 1981, the implicit price index (gross national expenditure) increased from 72.4 to 246.3, that is, by a factor of 3.4. Therefore, adjusted for inflation, land values in Saskatchewan have increased by a factor of 5 or 6 in the last 25 years. That increase can be accounted for, in part, by market forces, and in part by improvements, such as the construction of new farm buildings. See Statistics Canada Catalogue No. 11-003E Monthly (December, 1982).

property. Although the farmer brought the parcel of land into the marriage, he or she would not be able to take it out of marriage. This has meant that in some cases the distribution of matrimonial property has caused the loss of what was once a viable farm. The loss of a farm may mean the loss of a spouse's only livelihood.

The exemptions policy in the proposed Act is based on the proposition that appreciation on property brought into marriage should not ordinarily be divisible unless the appreciation was the result of improvements made by either or both of the spouses during the marriage. Section 24 of the proposed Act implements this basic exemptions policy. Property brought into marriage and appreciation thereon are in the first instance considered exempt. To the extent that the appreciation is not due to inflation or market forces, section 25 allows for a reduction of the exemption.³⁴

These basic exemptions rules can only operate where the property brought into marriage has not been sold or otherwise disposed of. If exempt property is sold or

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Section 25 of the proposed Act also refers to a number of other considerations, such as dissipation of other property or the payment of pre-marriage debts during the marriage, that may call for a reduction or loss of an exemption.

exchanged, the exemption is transferred to the proceeds, including any subsequent appreciation thereon. Proceeds are followed if they can be identified: when they cease to be identifiable, the value becomes fixed for exemption purposes.³⁵

A special rule is required to deal with property that depreciates through use or is consumed over time. For example, one spouse may at the time of marriage own a new automobile worth \$10,000.00. If the automobile is used as the family car for ten years, it may be worn out and all but worthless. If the spouses then separate, it would not do justice to return the automobile to the spouse who brought it into marriage, and divide the rest of the property equally. Where property brought into marriage has been used up for the mutual benefit of the spouses, the proposed Act allows the spouse who brought the property into marriage an exemption in dollar terms equal to that benefit. This would apply to the above example, but the exemption would not

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The concept of identifiable property is not new. It was introduced into Saskatchewan law by The Personal Property Security Act, R.S.S. 1978, c. P-6.1. It is preferable to the complex tracing rules that exist at common law.

extend to a situation where a spouse brings an asset into marriage and thereafter expends it for himself or herself alone.

A special exemptions rule is provided for the matrimonial home. Where one spouse has brought the home into the marriage, the benefit received by the marriage partnership should be recognized. But from the time the property becomes the family home, it takes on a special significance. The day-to-day use of the home creates in the spouses a greater degree of identification with the property. It is likely that they view the home as belonging to both of them. It is fair to suppose that any increase in value is intended to be shared. It is unlikely, however, that the spouses would regard as completely irrelevant the fact that it was originally owned by only one of them. The proposed Act therefore makes appreciation of the matrimonial home after marriage shareable in all cases. This is done by fixing the exemption at the equity in the property at the time it became the matrimonial home.

The exemptions policy in the proposed Act also extends to gifts and inheritances received after marriage. Most people who have expressed an opinion to the Commission on this issue agree that a gift or inheritance should not be divided unless the gift was intended for both spouses.

The exemptions provisions in the proposed Act are substantially different than those in the present Act. As noted above, only the value of property at time of marriage is exempt from distribution under the present Act. Perhaps because of a perceived inequity in literal application of that exemptions rule, the courts have been reluctant to apply it without modification. In several cases, judges relied on what has become known as the "capital base theory". The capital base theory reasoned that if a spouse brought property into marriage that served as the base from which other matrimonial property was built up, this special form of contribution should entitle that spouse to a greater than equal share of the non-exempt matrimonial property. The capital base theory was open to the criticism that it was incompatible with the exemptions provisions. In Farr v. Farr,³⁶ the Saskatchewan Court of Appeal approved the use of

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(1983), 21 Sask. R. 320.

the capital base theory. But the Court of Appeal decision was reversed on further appeal to the Supreme Court of Canada. Mr. Justice McIntyre, rendering the judgment of the Court, concluded that:

[T]he Capital Base Theory seems to me to be wholly incompatible with the statutory presumption of equal distribution subject to a finite set of exemptions which characterizes the legislation.³⁷

The proposed Act provides a broader exemption than is available under the present Act. Unlike the capital base theory, it achieves a fair result without opening the door to consideration of the relative contributions of the spouses, thus avoiding any conflict with the basic approach of the Act to contribution.

Another aspect of the exemptions policy of the present Act that has been criticized relates to the matrimonial home. It seems particularly unfair that if a substantial sum of money is brought into marriage by one spouse and is later used to purchase property that becomes the matrimonial home, any exemption is lost. This happened in Bricker v.

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Farr v. Farr, May 3, 1984, File No. 17661 (unreported), at 16.

Bricker,³⁸ where the court divided the value of the matrimonial home equally even though \$20,000 of exempt property had been applied towards the purchase price of the home. Once again, the courts have in some cases attempted to stretch the exemptions provisions of the Act in order to achieve fair results. In Sheridan v. Sheridan,³⁹ the fact that the home had been owned by the husband for 22 years prior to a marriage that lasted only 3 years was found to justify awarding to the husband the entire interest in the matrimonial home. But even this avenue may have been closed by the decision of the Supreme Court of Canada in Farr v. Farr.⁴⁰

A major source of controversy under the present Act is the status of gifts and inheritances received after marriage. Under the present Act, a gift or inheritance after marriage can never be exempt from distribution. The gift or inheritance may come within "contribution...by a

³⁸ (1983) 24 Sask. R. 269 (Q.B.); see also Nistor v. Nistor (1980), 8 Sask. R. 252 (Q.B.).

³⁹ (1981), 10 Sask. R. 255 (Q.B.); see also Donauer v. Donauer (1981), 10 Sask. R. 230 (Q.B.).

⁴⁰ Supra, footnote 36.

third party"⁴¹ as a ground for making an unequal division. However, the reported cases suggest that an unequal division can be based on this ground only if there is clear evidence that the donor or testator did not intend to benefit the other spouse as well.⁴²

The exemptions provisions of the present Act also run into difficulty if property owned at the time of marriage is disposed of. Unless it is possible to identify property "exchanged" for the exempt property, the exemption is lost. Furthermore, if exempt property is expended or used up for the benefit of the spouses, the present Act allows no exemption at all.⁴³

Before leaving the subject of exemptions, it should be mentioned that Ontario and several other provinces take a completely different approach to exemptions. In those provinces, matrimonial property is divided into family

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Clause 21(1)(e) of the present Act.

⁴² Pepper v. Pepper (1982), 18 Sask. R. 144 (Q.B.); Lea v. Lea (1983), 25 Sask. R. 168 (U.F.C.).

⁴³ The difficulty in determining how to apply the exemption policy in the present Act to property that has been disposed of is illustrated in Sarich v. Sarich (1983), 27 Sask. R. 95 (U.F.C.).

assets and business assets.⁴⁴ Family assets are ordinarily shareable, whatever their source, and business assets are ordinarily exempt, unless contribution in respect of those assets is shown.

The apparent simplicity of the approach masks a multitude of problems. The Commission's analysis of reported cases in jurisdictions employing a family assets/business assets distinction indicates that the approach does not work well. Although the distinction sounds simple enough, it has proved almost impossible in practice for the courts to draw a consistent line between them. The courts have also found it difficult to determine to what extent indirect, non-financial contribution can create an interest in the other spouse's business assets.⁴⁵ Recently, the Attorney-General for the Province of Ontario has suggested that the Ontario legislation may be amended to

⁴⁴ This is the case in British Columbia, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island. Manitoba's legislation also draws a distinction between family assets and business assets, but only to provide a stronger presumption of equal sharing of family assets; business assets are also presumed to be equally shareable, but the presumption is more easily rebutted.

⁴⁵ In Leatherdale v. Leatherdale (1983), 142 D.L.R. (3d) 193, the Supreme Court of Canada grappled with this very issue, but did not finally resolve it.

move away from the family assets/business assets distinction.⁴⁶ The distinction is not founded on any rational examination of the reasons why matrimonial property is shareable, and for that reason alone is less acceptable than an exemptions policy firmly based on the concept of marriage as a partnership.

E. Dissipation

The Matrimonial Property Act, because it is based on the idea of deferred division, leaves each spouse free to acquire, sell and encumber property, unless and until a court orders distribution of the matrimonial property. But extravagant spending of matrimonial property by one spouse could undermine the right of the other spouse to a fair share of matrimonial property. For this reason, the present Act allows a court to restrain a spouse from dissipating matrimonial property. The court may also adjust the division of assets to take into account dissipation that has already taken place. The proposed Act retains these important protections.

⁴⁶ Robert Stephens, "New split of family assets sought", The Globe and Mail, National Edition, March 22, 1984, 4.

"Dissipation" in the present Act is defined as jeopardizing the financial security of a household by a squandering of property. The proposed Act refines this definition in several respects. The word "squandering" is replaced by a reference to an extravagant or wasteful dealing with matrimonial property. This wording is perhaps more precise than the term "squandering", which might be interpreted as including poor financial management. Dissipation should not include bona fide, though ill advised, investments made for what was hoped to be the benefit of the spouses. On the other hand, under the proposed Act, it is not necessary that conduct jeopardize the financial security of the spouses, as long as it is of an extravagant or wasteful nature. Dissipation may also occur where a spouse gives a substantial gift (including a sale at less than fair market value) to a third party. The proposed Act makes it clear that there can be no dissipation where the other spouse has consented to the conduct. Furthermore, there can be no dissipation of exempt property, as this property is not ordinarily shareable.

In the present Act, dissipation is material in three ways. If a spouse has dissipated matrimonial property, the court may consider this as a factor justifying an unequal division of the remaining property. If a fair division cannot otherwise be achieved by distributing the remaining property, the court may distribute property that would otherwise be exempt from distribution. Finally, a court may intervene to restrain dissipation that has not yet occurred, or in certain circumstances to set aside a transaction that amounts to dissipation. All three of these features of the present Act have been substantively retained in the proposed Act.

F. Date of Valuation

Most people who commented on the issue were of the opinion that the appropriate date for valuation and division of matrimonial property should ordinarily be the date of final separation of the spouses. The logic is undeniable: when spouses finally go their separate ways, the marriage partnership is over, and joint contribution has ceased. The proposed Act therefore adopts the date of separation as the material date for valuation and division of matrimonial

property.⁴⁷ This represents a significant change from the present Act, which directs the court to value the matrimonial property at either the date of the application or the date of the order for distribution.

In adopting the date of separation as the date for calculating the spouses' shares in the matrimonial property, the proposed Act creates a distinction between "division" and "distribution". Division refers to the abstract process of determining the share to which each spouse is entitled; distribution refers to the actual determination of what property goes to each spouse. The distinction is necessary in the proposed Act because although the division is calculated as at the date of separation, the order for distribution can be directed only at the property owned by the spouses when the order is made.

In order to make the step from "division" to "distribution", the court will in most cases have to make certain adjustments to reflect what has happened to the

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The proposed Act continues the policy of the present Act in permitting court applications for division even though the spouses are cohabiting. In such a case, under the proposed Act the material date for valuation and division is the date of the application. The vast majority of applications, however, are made only when the marriage has broken down.

property since the date of separation. Although employment income after the date of separation should not be subject to division, income produced after the date of separation by shareable matrimonial property should be divided. An increase after the date of valuation in the value of divisible property should be divisible if the increase is due purely to market forces; but to the extent that the increase in value is due to the efforts after separation of only one spouse, the increase should not be divisible. Also, if one spouse has had the exclusive use and enjoyment of, or perhaps income from, matrimonial property since the separation, another adjustment is called for. The proposed Act directs the court to make these adjustments, and describes them in broad terms in order to give the court the latitude needed to convert a fair division into a fair distribution of matrimonial property.

Adjustments are necessary under the present Act as well, although they operate from the opposite direction. Instead of starting at the date of separation and considering what has happened to the property since, the present Act starts at the date of application or adjudication and looks back. The adjustment takes the form

of a factor to be considered in dividing property: the present Act refers to "the duration of the period during which the spouses have lived separate and apart".⁴⁸

In the Commission's view, this important consideration should not be relegated to a mere factor that may or may not be considered. The present Act puts the emphasis on the date of application or adjudication rather than the date of separation, and this may discourage a full consideration of the issues surrounding the valuation date. The length of separation has occasionally been taken into consideration in judgments, but usually only where there has been a very long separation⁴⁹ or where there was some other obvious reason for considering the factor. Only one reported decision, Edie v. Edie,⁵⁰ has acknowledged the important distinction between property acquired after separation from income attributable to shareable property and income attributable to contribution by one spouse alone after separation.

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Clause 21(1)(c).

⁴⁹ Glushyk v. Glushyk (1981), 12 Sask. R. 406 (Q.B.).

⁵⁰ (1981), 12 Sask. R. 15 (U.F.C.).

G. Distribution Orders

Both the proposed Act and the present Act list a number of kinds of orders a court may make to distribute matrimonial property. For example, the court may vest property in a spouse, order that property be transferred or create a charge on it, or order a money judgment. The list of possible orders has been streamlined in the proposed Act. But because the court is given a general power to make any other kind of order that it feels is necessary, the proposed Act does not reduce the court's options in distributing matrimonial property.

Immediate distribution of the property may require the liquidation of major capital assets. The court may, however, make an order deferring the distribution. For example, the court might make an order that a spouse's share of farm property be paid in equal annual installments over the next five years. The court could also order that the installments be secured by a mortgage against the land.

Such deferred distribution orders are particularly appropriate in cases where a transfer of property, or a money judgment, would have serious consequences for a spouse who uses the property to carry on a business or a farming

operation. A transfer of farm property may result in neither spouse having enough property to carry on a viable operation. A large money judgment could cause a cash flow problem, or make it difficult for the farmer to raise operating capital.

Most people in the province would agree that the loss of viable farms and businesses should be avoided if it is possible to do so without causing injustice between the spouses. While it may not always be fair to do so, an order deferring distribution will be the best alternative in some cases. Most farm families do not regard liquidation of the farm's capital assets as a realistic prospect prior to retirement. There is little justification for treating a matrimonial property division as a reason for immediately distributing to one of the spouses liquid assets that would not ordinarily be available. In contrast, although it would be possible to save a farm or business by awarding the farming spouse or proprietor the lion's share of the matrimonial property, this would be unfair to the other spouse.

The courts already have the power to defer distribution under the present Act, and thereby avoid destruction of viable economic units or the livelihood of a farming spouse. But the courts have not consistently acted to preserve viable farms or businesses by deferring distribution where it would be feasible to do so. As Mr. Justice McLeod noted in Patron v. Patron, the Act does not contain "any notions of social policy or public interest as to the preservation of farms or any other businesses".⁵¹ The proposed Act makes a clear policy statement in favour of deferring distribution in appropriate cases. The court is required to make a deferred sharing order where a distribution would "substantially affect the livelihood of a spouse", or "substantially impair the viability of a business or farm".⁵² However, the deferred distribution should not be made if the court is of the opinion that it would not achieve the desired purpose, or would be unfair or impractical. It must be borne in mind that both spouses have a right to a share of the property. The interests of

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(1981), 7 Sask. R. 366, at 372-3 (Q.B.).

⁵² Subsection 29(1) of the proposed Matrimonial Property Act, 1984.

both spouses must be balanced, having regard to the facts of each case. For that reason, the provision requires only that the court consider the impact of the order and attempt to soften the blow if it is possible to do so.

The proposed Act addresses another situation where a form of deferred distribution may be justified. The proposed Act, unlike the present Act, does not include the interests of the children as a ground for departing from equal division of the matrimonial home. Instead, the proposed Act directs the court to defer distribution of the home if it is in the interests of the children to do so. This would allow a court to grant the custodial parent possession of the matrimonial home until the children reach an appropriate age, without having to resort to an unequal, and possibly unfair, division of the equity in the home.

Under the proposed Act, consideration of tax consequences is a mandatory, automatic step when an order for distribution is made. But it is sometimes impossible to determine with any degree of precision what the tax consequences of the order will be. The court may direct the sale of land, or land may have to be sold in order to raise money to pay a judgment, and capital gains tax will be

attracted. The amount of extra tax that will be payable as a result of the sale of capital property will depend upon the income of the vendor from other sources during the year, and any capital losses that may be offset against the capital gains.

The proposed Act therefore contains a new provision that enables the court to give leave to the parties to reapply for an order adjusting the distribution in light of the actual tax consequences. In most cases the order could give sufficient direction to allow the spouses to make the final adjustment themselves, without having to reapply to the court.

H. Pensions

The proposed Act provides express rules for the valuation and distribution of pensions, thus removing any doubt that might still remain as to whether pensions are shareable matrimonial property.⁵³ Contributions to a pension plan represent an allocation of an important economic resource of the family - income from employment.

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The Saskatchewan Court of Appeal, in Tataryn v. Tataryn (1984), 30 Sask. R. 282, has recently confirmed that, at least in most cases, pensions are matrimonial property subject to division.

That income, if not diverted to the pension plan, would be used to maintain the family or to accumulate other matrimonial property. A pension is in many cases the single most valuable asset a couple accumulates during a marriage.

Pensions are difficult to value. All other kinds of matrimonial property can be assigned a market value, but pensions have no market value because The Pension Benefits Act ⁵⁴ prohibits any sale or pledge of an interest in a pension plan. But difficulty in valuing pensions does not justify excluding them from distribution.

The reported cases in which courts have distributed rights in a pension plan have demonstrated a commendable judicial creativity. In some cases, the court has vested an interest in the pension rights in the other spouse, so that when the pension matures, each spouse will be entitled to a portion of the monthly payments.⁵⁵ In other cases, the same result has been achieved by declaring that the pension

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R.S.S. 1978, c. P-6, s. 19; but note that the prohibition against assigning or attaching a pension plan does not apply to a court order or an agreement between spouses under The Matrimonial Property Act.

⁵⁵ For example, see Topliss v. Topliss (1983), 23 Sask. R. 289 (Q.B.).

rights are to be held in trust for both spouses.⁵⁶ Either of these options avoids the major valuation problems, while achieving a real division of the future benefit represented by the pension. And where the pension is the major asset of the spouses, payment to the non-employee spouse of his or her share of the pension's value may be unfair or even impossible. Another advantage of the trust or vesting order devices is that any tax attracted by the pension benefits when they are received will fall upon the ultimate recipient of the benefits.

The proposed Act expressly empowers the court to distribute an interest in a pension plan by making either a vesting order or a declaration of trust. It also enables the court to prohibit an employer from paying out any pension benefits except in accordance with the vesting order.

In some situations, however, it is not practical to delay the final distribution of pension benefits. If the employee spouse is many years away from retirement age, and has contributed to the pension plan for only a few years, a

⁵⁶ For example, see Fisher v. Fisher (1983), 21 Sask. R. 235 (Q.B.).

vesting order or declaration of trust would delay the final accounting between the spouses for an unreasonably long period of time. Whenever possible, a distribution of matrimonial property should aim at severing economic ties between spouses at a relatively early date. In some cases, the only practical alternative is to leave the pension itself with the employee spouse, and to distribute other matrimonial property or order a cash payment to the other spouse. In these cases, a value must be ascribed to the pension rights.

The courts have not found valuing pensions to be an easy task. In at least three cases, the court has declined to value or distribute the pension, instead treating it as a future source of maintenance payments.⁵⁷ In another case, the Saskatchewan Court of Appeal refused to divide or distribute a spouse's pension rights, because the applicant spouse did not adduce any evidence at trial on which a

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Zakreski v. Zakreski (1981), 10 Sask. R. 1 (U.F.C.), Ronning v. Ronning (1982), 27 R.F.L. (2d) 1 (Q.B.), and Gray v. Gray (1983), 19 Sask. R. 39 (Q.B.); however, the Court of Appeal recently disapproved of this approach in Tataryn v. Tataryn, supra, footnote 53.

valuation could be based.⁵⁸ Sometimes pensions have been given a value without any indication of the calculations that were made.⁵⁹

In the majority of cases, however, the courts have confronted the valuation problem, and a variety of valuation methods have been applied. Two general approaches can be identified: the actuarial approach and the contributions approach. Each of these methods has advantages and disadvantages.

The actuarial approach relies on the expert evidence of actuaries to determine the capitalized value of pension rights. This involves speculation as to the probable future benefit that will be received under the terms of the plan. In most cases, the value of the future benefit will depend on a number of contingencies, such as how long the employee will remain in the service of an employer and how long he or she will live. An actuary can assist in assigning a value to the pension rights on the basis of certain assumptions about these contingencies.

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Morrell v. Morrell (1983), 22 Sask. R. 106.

⁵⁹ See Partington v. Partington (1982), 18 Sask. R. 172 (U.F.C.).

The actuarial approach is not designed to compute the precise value of a pension. If all material contingencies are not taken into account, the probability of error is magnified. Actuarial evidence is better suited to determining the average benefits to be received by members of a large group of employees than to determining the value of an individual pension. It has, however, furnished a useful guideline to the courts in an area where guidelines are not readily available.

Because the actuarial approach requires expert assessment, it entails considerable expense. As the Court of Appeal observed in Tataryn v. Tataryn:

[I]t is not enough to have the evidence, alone, of the administrator of the pension plan (or someone else fully conversant with the scheme); his evidence is critical, but there must be more. Several sub-issues have to be addressed: life expectancy; pensionable age expectancy; continued employment expectancy; the prospects for the employer, including the provisions, if any, which have been made for the protection of the employer's [sic] pension in the event of the insolvency of the employer; present value, of the principal pension, as well as any death benefits; the ramifications of any other options available under the plan; tax implications; and the like. Otherwise it is difficult, if not impossible, to make the distribution contemplated by the Act.⁶⁰

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Supra, footnote 53, at 295.

The second major approach used by the courts involves a valuation on the basis of the contributions to the plan. For example, in Boychuk v. Boychuk⁶¹ the court valued the pension rights of each spouse on the basis of the total employee contributions to the plan, plus an estimated rate of interest. This approach was utilized even though actuarial evidence was available.

There is a problem with basing the value of pension rights on the contributions to the plan. In most cases the actual value of the future benefit bears only an indirect relation to the amount of contributions. There are some pension plans, usually called "money accumulation plans", where the monthly benefits payable to the employee upon retirement are calculated according to the life annuity that can be purchased by the accumulated contributions plus accrued interest. For these plans, basing valuation on contributions is an obvious and logical approach. But the vast majority of pension plans fall into the category of

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(1981), 9 Sask. R. 82 (Q.B.); see also Kaine v. Kaine
(1983), 30 Sask. R. 23 (Q.B.).

"defined benefit plans",⁶² where there is no direct relationship between the amount of contributions and the amount of benefits payable. In a defined benefit plan, the payments after retirement are based not on contributions, but on some pre-determined formula: for example, one public service pension plan provides for an annual pension of 2% of the average salary during the six consecutive years of highest salary multiplied by the total number of years of service. For these plans, the accumulated contributions may not provide an accurate indication of the true value of the pension rights.

A complicating factor for both the actuarial and contributions approaches has to do with whether a pension has vested. A pension is said to vest when the employee has a right, upon termination of employment prior to the prescribed retirement age, to a deferred life annuity under which payments will commence when the employee reaches

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According to a 1980 Statistics Canada report, "Pension Plans in Canada", Catalogue No. 74-401, almost 94% of employees who then had pension plans were in defined benefit plans, and this percentage represented an increase from the 1970 figures. There is reason to suspect that this percentage might be slightly lower if only Saskatchewan were considered, because of the wide use of "money accumulation plans" in the public service in this province.

retirement age. If a pension has not vested and the employee leaves his job or is terminated, the employee is in almost all cases entitled only to return of his own contributions. Any employer contributions to the plan are lost.

But even where a pension has vested, the employee usually has the option of receiving a refund of all or part of his contributions.⁶³ If the employee so elects, the deferred life annuity is reduced correspondingly. To that extent, the employer contributions are lost. This is significant because in a study of 243,000 employees who terminated their employment after vesting but before retirement, over 97% opted for an immediate refund.⁶⁴ Both the actuarial approach and the contributions approach in some cases would produce an unrealistically high value.

This problem is more likely to occur where employees are more than a few years away from retirement age, and therefore correspondingly more likely to change employers

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This is subject to The Pension Benefits Act, R.S.S. 1978, c. P-6, which ensures the right to claim a refund of contributions but also limits that right.

⁶⁴ Statistics Canada, "Pension Plans in Canada", supra, footnote 62.

prior to retirement. But these are the very cases where valuation is necessary; if retirement is near, the court will be more likely to declare a trust or vest in the other spouse an interest in the pension.

The Commission has included in the proposed Act a formula for valuing pensions. No other province in Canada has yet hazarded to do so. The Commission realizes that there is no easy solution or formula that will put a precise and accurate value on all pensions in all circumstances. But if a formula can be put forward that combines simplicity and workability of operation with a high degree of predictability, that formula should be favoured if it can produce at least a fair approximation of the value of a pension. At present, potential litigants cannot reasonably predict whether the court will look to actuarial evidence, consider contributions to the plan, simply eyeball the pension, or decline to divide it altogether. The number of cases litigated over pensions attests to the difficulty of negotiating settlements.

The formula in the proposed Act is based on employee contributions. The employee's contributions from the date of marriage to the date of separation, plus interest

thereon, are to be divided. This approach provides simplicity, workability, and predictability. It also reflects the one certainty about pensions: when pension contributions are deducted from a spouse's paycheck, those monies are taken out of the family's finances and set apart from the other income produced by the marriage partnership. Any other result flowing from those contributions is dependent on contingencies.

This would not by itself justify an approach to valuation that does not take into account employer contributions. Employer contributions are often only notional, in that the employer does not actually pay into a fund, but only guarantees payment to the employee upon retirement of the defined benefit prescribed by the terms of the plan. But undeniably, employer contributions will in most cases ultimately be the source of at least part of the benefits that the employee spouse will someday receive.

There is, however, another reason, admittedly artificial, why the proposed Act looks only at employee contributions. The exclusion of employer contributions is offset by a number of other factors. These factors, most of which have been mentioned above, can be listed as follows:

- (1) The future benefits, when ultimately received by the employee spouse, will be taxable in the hands of that spouse;
- (2) The employment may be terminated before the plan vests, so that the employer contributions will be forfeited;
- (3) Even if the pension has vested, the employee spouse may, upon terminating prior to retirement age, obtain a refund of all or part of his contributions, and thereby forfeit all or part of the benefit of the employer contributions;
- (4) The pension will remain subject to numerous contingencies, not the least of which is the possibility that the employee spouse may die before the pension matures;
- (5) A spouse should pay some premium for receiving an immediate share of an asset from which the other spouse can obtain no benefit until well into the future.

This last factor was recognized by Mr. Justice Cameron in rendering the judgment of the Court of Appeal in the Tataryn case:

[A] sum in hand with no impediment in respect to its full use and enjoyment is worth more, it seems to me, than an equal sum subject to limitations respecting use....Unfortunately, there is no evidence of the extent to which an adjustment in this respect may be appropriate. Nevertheless it should be borne in mind ⁶⁵ in arriving at an equitable sharing.

Whether or not these factors will in most cases be accurately balanced by the exclusion of employer contributions is a question not easily answered. But this approach permits a relatively simple calculation of the value of pension rights subject to distribution without resort to actuarial evidence. At the same time, it likely provides as accurate a measure of the real value of pension rights as any other method which has been brought to the Commission's attention. Valuation of pension rights is shrouded by uncertainty and complicated by contingency upon contingency. The most plausible alternative method of valuation - the actuarial approach - cannot hope to achieve precision in individual cases, and lacks the simplicity of the employee contribution approach.

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Tataryn v. Tataryn, supra, footnote 53, at 297.

The proposed Act does look to employer contributions in one very important context. Many pension plans are "non-contributory", which means that all contributions are made by the employer. These plans are obviously not without value. It may be assumed that, all other things being equal, an employee in a non-contributory plan would have a lower gross salary than an employee in a contributory plan. In effect, an employee's contributions are built into the plan. The proposed Act therefore allows the court to deem up to one-half of the total contributions to the pension plan to have been employee contributions. In this context, the employer's contributions include not only sums actually paid over by an employer into a pension plan, but also an employer's notional contributions. If this provision were not included, it would be possible to set up a "spouse-sheltered" pension plan, by reducing the employee's contributions and correspondingly increasing the employer's contributions, while adjusting the gross salary accordingly.

The area of pensions is too complex to resolve without the fullest possible discussion. It is hoped that these tentative proposals will elicit response from the public generally, as well as from individuals and associations who have a special expertise or knowledge of pension plans.

IV. DISTRIBUTION AFTER DEATH OF A SPOUSE

The Matrimonial Property Act is based on the idea of "deferred sharing": the legislation does not create any right of a non-owning spouse to matrimonial property until an order distributing the property is made. But the Act is also premised on the idea that the joint contributions of spouses during marriage entitles each to share in the assets acquired during the marriage. This entitlement should not be extinguished on the death of the spouse with title to the property. For this reason, the proposed Act rejects the approach of several provinces, where the right to apply for distribution lapses on the death of the other spouse.⁶⁶ The present Act allows a surviving spouse to bring an application for distribution of matrimonial property after the death of the other spouse, and the proposed Act retains this feature.

The thorniest problems arising from post-death distributions of matrimonial property relate to the interaction between the Act and the entitlement of a

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In British Columbia, Ontario and Prince Edward Island, no post-death application is possible, and in Alberta and Manitoba an application may be maintained only if a "triggering event" such as divorce or separation has occurred prior to death.

surviving spouse under a will, under The Intestate Succession Act,⁶⁷ and under The Dependants' Relief Act.⁶⁸

It must be resolved whether these entitlements and a claim to post-death distribution of matrimonial property are to be mutually exclusive or cumulative.

Under the present Act, where a deceased spouse has left a will, a court distributing matrimonial property has a discretion to take into account any entitlement of the surviving spouse under the will. Presumably, entitlement under the will would be a ground for distributing to the surviving spouse less than an equal share of the remaining property. But the Act provides no guidance as to how the discretion should be exercised, and this may create problems.⁶⁹

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R.S.S. 1978, c. I-13.

⁶⁸ R.S.S. 1978, c. D-25.

⁶⁹ The difficulty in determining the effect of the provision of a will on a division of property is illustrated in Bugoy v. Bugoy, [1981] 4 W.W.R. 136 (Sask. Q.B.), leave to appeal to the Supreme Court of Canada granted (1982), 18 Sask. R. 180, in which the court increased the share of the surviving spouse under The Matrimonial Property Act because the court was of the opinion that the will had made inadequate provision for him.

Consider a case where a deceased's will contains a bequest of \$60,000 to the spouse with the residue to be divided between two children from a previous marriage. When the testator dies, the estate is worth \$100,000. If the surviving spouse is permitted to claim under both the will and matrimonial property legislation, the gifts to the children may be defeated, and the deceased's intention frustrated.

In the last analysis, the issue is the intention of the deceased spouse. Should it be presumed that the deceased intended the surviving spouse to take substantially the whole estate by the combined operation of the will and The Matrimonial Property Act? The usual expectation is that on death all property owned by the deceased will be distributed in accordance with the will. Rarely would a person making a will reduce his spouse's share in contemplation that a matrimonial property application might be brought.

But regardless of the intention of the deceased spouse, it is clear that the surviving spouse is at very least entitled to the share of property that would be ordered under The Matrimonial Property Act, because that property

has been earned by the spouse through contributions to the marriage. The proposed Act balances these two considerations.

Under the proposed Act, the claim of a surviving spouse to matrimonial property is, in effect, reduced by that spouse's entitlement under the will. A surviving spouse may reject the share given under the will if he or she has a greater entitlement to the property under The Matrimonial Property Act. Very often the deceased spouse will have left all or most of the property to the spouse. In such a case, the surviving spouse can simply choose to take under the will.

The Intestate Succession Act provides that where there is no will a surviving spouse is entitled to \$40,000 plus one-third to one-half of the remainder of the estate, depending on the number of children. The theory behind the legislation is to imply what the intestate's will would have said had he or she made one. It follows that matrimonial property legislation should interact with entitlement on intestacy in the same way that it interacts with entitlement under a will. The proposed Act therefore limits a surviving spouse to the greater of his or her entitlement under the

Act or under The Intestate Succession Act. The present Act, in contrast, directs a court distributing matrimonial property not to take into consideration any amount payable to a spouse under The Intestate Succession Act.

Intestacy does, however, involve an additional consideration. On intestacy, the deceased spouse has not manifested an intention to limit his spouse's share of his estate. This probably explains the present Act's approach to intestacy. Because of this consideration, the Commission is of the view that reduction of a surviving spouse's claim under matrimonial property legislation by the amount of the benefit received under The Intestate Succession Act is justified only if the preferential share available to the surviving spouse under intestacy legislation is made to more closely reflect the provision for a surviving spouse that would ordinarily be made by will. In most cases, a deceased spouse leaves substantially all of a small or moderately sized estate to the other spouse. Therefore, it is proposed as a consequential amendment that a surviving spouse's preferential share under The Intestate Succession Act be

increased from \$40,000 to \$100,000.⁷⁰ In many estates the only substantial asset is the matrimonial home. The figure of \$100,000 is intended to cover the equity in the family home in the ordinary case. The amendment will also have the advantage of making matrimonial property and dependants' relief applications unnecessary in most cases of intestacy.

Dependants' relief legislation, by contrast, should be based not on entitlement to property, but on maintenance considerations. There is no reason why an order under The Dependants' Relief Act could not be supplementary to an order for distribution of matrimonial property. But because maintenance is the cornerstone, The Dependants' Relief Act application should not be considered until questions of matrimonial property division have been resolved; the economic needs of a surviving spouse cannot be determined until his or her share in the matrimonial property is ascertained. For this reason, it is proposed that The Dependants' Relief Act be amended to ensure that where a

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It is worth noting that the analogous Ontario legislation now provides for a preferential share of \$75,000, and that the Uniform Law Conference of Canada has been considering a proposal to raise the preferential share of a surviving spouse to \$100,000.

surviving spouse contemplates both a matrimonial property application and a Dependants' Relief Act application, the former is resolved before the latter.

There is one further problem with The Dependants' Relief Act. The Act provides that if an allowance is awarded to a wife, it must be at least the amount she would have received had her husband died intestate. This provision appears to be a method of dividing property between spouses, rather than a matter of maintenance. It no longer has any useful role to play since the enactment of matrimonial property legislation. Questions of entitlement to property between spouses should be governed by The Matrimonial Property Act. The Dependants' Relief Act should therefore be concerned only with the needs of the surviving spouse. This feature of The Dependants' Relief Act should be repealed, particularly in light of the recommendation to raise the preferential share to \$100,000.

A post-death application for distribution of matrimonial property may also have significant impact on the interests of creditors and beneficiaries of the estate. In principle, it is not assets but equity or net worth that is divided on a matrimonial property application. Debts should

always be taken into consideration by the court when an order is made. Therefore, in the ordinary case there will be no conflict between the interests of creditors and an applicant spouse. The exception is where a deceased spouse dissipated matrimonial property. In that instance, the value of the remaining matrimonial property may be insufficient to satisfy the claims of both the surviving spouse and creditors of the estate. It would be impractical to set out in the proposed Act the circumstances in which the respective claims should prevail. Instead, the court is directed not to make a division that would unfairly prejudice creditors in respect of debts incurred for the benefit of both spouses or for the purpose of acquiring matrimonial property.

The position of the personal representative vis-a-vis creditors has also been clarified in the proposed Act. Because there is ordinarily no conflict between the claims of the surviving spouse and those of creditors, there is no justification for delaying payment of debts for six months, as is the rule under the present Act. The proposed Act

authorizes the personal representative to proceed with payment of debts unless the surviving spouse obtains an order restraining such action.

V. CONTRACTING OUT OF THE ACT

Matrimonial property legislation must be designed to reflect notions of fairness held by most people. However, some married couples may have a different concept of what is fair. Other couples may require a greater degree of certainty than can be provided by a statute in which judicial discretion is an important element. Therefore, spouses should have the right to establish their own property regime by contracting out of the statutory scheme. At present, spouses may, either before or after marriage, opt out of The Matrimonial Property Act by agreement. The proposed Act retains this feature, but aims at remedying some minor conceptual problems in the present provisions.

Agreements between spouses must be approached with caution. In marriage, the most intimate of relationships, a great deal of mutual trust and dependence is usually present. In no relationship is there a greater potential for one party to take unfair advantage of the other. In the days before a wedding, or those after a marriage has begun to collapse, highly charged emotions may further cloud

judgment. For these reasons, special rules and special precautions are appropriate when dealing with agreements between spouses.

The proposed Act starts from the position that all written agreements signed by spouses will override the Act. It then sets out the circumstances where the court should not give effect to the agreement. In contrast, the present Act requires certain formalities before an agreement between spouses supersedes the statute. These formalities include a requirement that the agreement be witnessed and accompanied by an acknowledgement signed by each spouse stating that each is aware of the nature and effect of the contract and the rights created by the Act. The acknowledgement must be made before a lawyer not acting for the other spouse, but the role of the lawyer is not clear: the present Act does not require that the lawyer actually provide legal advice.

The emphasis should not be on formalities. It is reasonable to assume that independent legal advice will go a long way towards preventing one spouse from taking unfair advantage of the other, and to ensure that agreements are entered into on a rational assessment of the matters in

issue. In Wright v. Wright,⁷¹ however, the court held that although both spouses had obtained independent legal advice, the agreement did not qualify as an "interspousal contract" because it did not contain the required acknowledgement.

The emphasis in the proposed Act is on the existence of independent legal advice as a question of fact. Because parties may wish to remove any doubt as to whether independent legal advice was in fact obtained, a form of Certificate of Independent Legal Advice is provided. The Certificate is conclusive evidence of independent legal advice, but it is not the only method of establishing that independent legal advice was obtained.

Under the present Act, an "interspousal contract" may be set aside if it is unconscionable or is grossly unfair. If, however, the written agreement does not meet the formalities set out in the Act, it is not an "interspousal contract", but is merely a factor that a court may consider in ordering an unequal division of matrimonial property. The existence of a written agreement between spouses should not be a mere factor which may or may not be considered.

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(1981) 15 Sask. R. 98 (Q.B.).

Under general contract law, an agreement may be set aside if it was extracted through duress or by undue influence, and contracts between spouses are subject to these rules. Another ground for setting aside contracts is unconscionability. A contract is "unconscionable" if two elements are present: substantial unfairness, combined with one party having taken unfair advantage of the ignorance, need or distress of the other.⁷² Without this second element, a contract may not be set aside simply because it is unfair. In the special context of agreements between spouses, because the circumstances of such agreements are so often charged with stress and emotion, and influenced by the very intimacy of the relationship, it is reasonable to presume unfair advantage. On the other hand, where each spouse has obtained independent legal advice, no such presumption is appropriate.

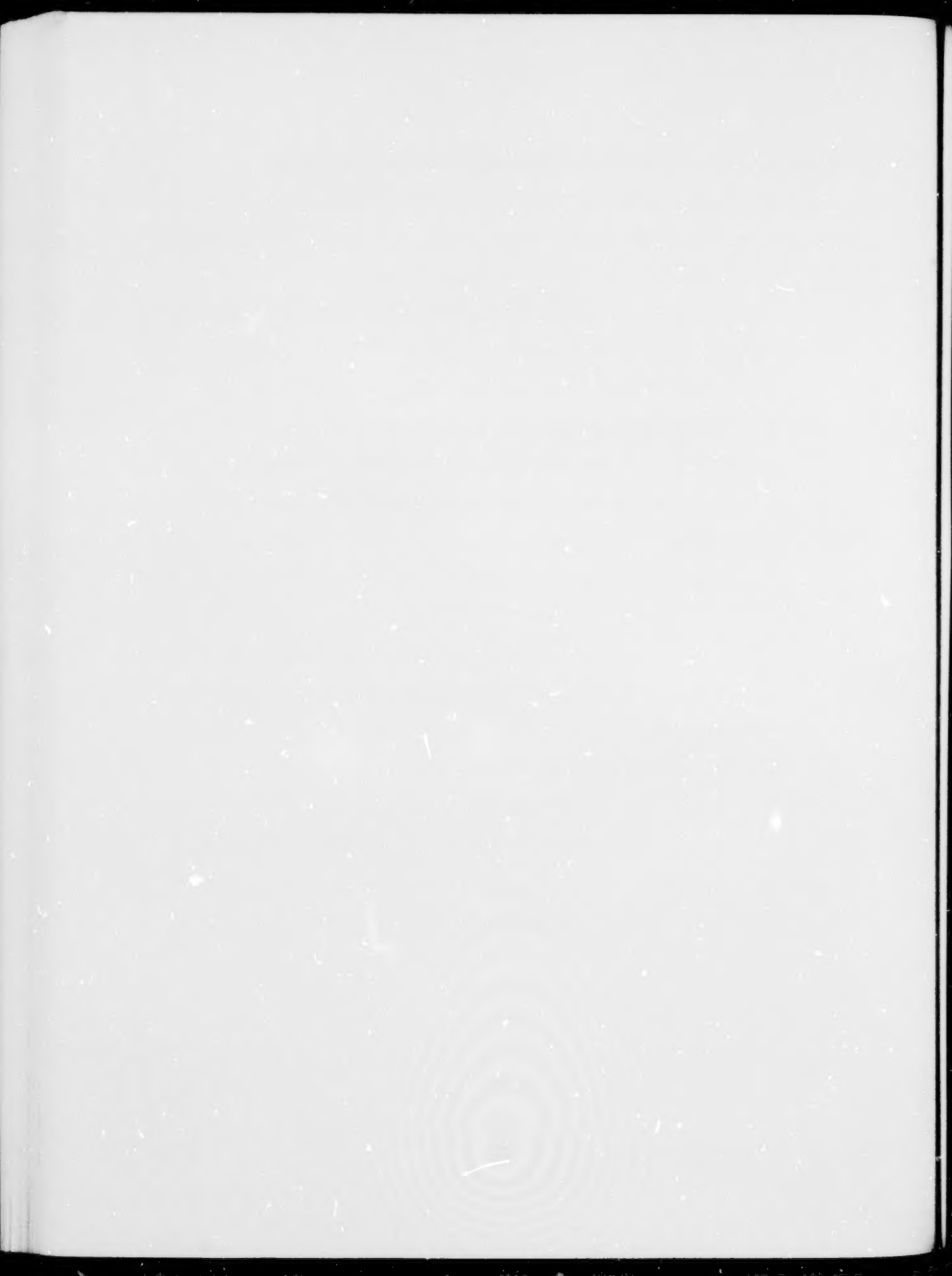
⁷² -----
S.M. Waddams, The Law of Contracts, Toronto: Canada Law Book Limited, 1977, at 344 states that the "twin criteria" for unconscionability adopted by the modern Canadian cases are "a large inequality of exchange combined with inequality of bargaining power". In Cadieu v. Cadieu (1981), 10 Sask. R. 305 (Q.B.) and in Theaker v. Theaker (1984), 31 Sask. R. 230 (Q.B.) the court adopted this test.

In consequence, the proposed Act directs the court not to give effect to an agreement that was substantially unfair at the time it was entered into. If, however, each spouse did obtain independent legal advice, the agreement will govern unless it was substantially unfair and it is established that one spouse took unfair advantage of the ignorance, need, or distress of the other.

Like the present Act, the proposed Act permits a court to give oral agreements whatever weight it considers reasonable. Oral agreements do not have any generally binding effect because spouses should not lightly be assumed to intend to create legal relations when they orally agree on matters of property.

Pre-marriage contracts between spouses are not prevalent in Saskatchewan. Some day they may become commonplace, as they are in Quebec and in some European jurisdictions. Where spouses have by contract, either before or after marriage, purported to set up their own regime for division of matrimonial property, it is important that they can be reasonably certain that they have succeeded in doing so. It is also important to ensure that agreements

between spouses are premised on the free and informed consent of each spouse. The proposed Act is designed to embody these two key principles.



PROPOSED MATRIMONIAL PROPERTY ACT, 1984
and
SECTION-BY-SECTION COMMENTARY

THE PROPOSED
MATRIMONIAL PROPERTY ACT

SHORT TITLE AND INTERPRETATION

Short
title

1.

This Act may be cited as The Matrimonial Property Act, 1984.

Interpretation

2.

In this Act:

"child"

(a) "child" means:

- (i) a child of the spouses;
- (ii) any person to whom both spouses stand in loco parentis; or
- (iii) any person of whom either spouse is a parent and to whom the other spouse stands in loco parentis;

who is under the age of eighteen years, or who is eighteen years or over and under the charge of one or both spouses and unable, by reason of illness or disability, to withdraw from such charge.

"court"

(b) "court" means the Court of Queen's Bench or the Unified Family Court;

"household goods"

(c) "household goods" means personal property that is ordinarily used, acquired or enjoyed by both spouses or by any child for transportation, household, educational, recreational, social or aesthetic purposes, but does not include personal use property;

COMMENTARY

INTERPRETATION

Note: Further definitions are contained in Part II.

Section 2.-(a) "child"

The definition of "child" has been clarified but the content is substantially the same as in the present Act.

(c) "household goods"

The definition of "household goods" is altered by referring to "property used...by both spouses or by any child" rather than to "one or both spouses". It is property used by the family rather than property used by only one spouse that deserves special protection (see also "personal use property").

"matrimonial home"

(d) "matrimonial home" means matrimonial property that is:

- (i) a house or part of a house, including that portion of the land appurtenant thereto as may reasonably be regarded as necessary for the use and enjoyment of the residence;
- (ii) that portion of business premises that is used as living accommodation;
- (iii) a trailer or mobile home, including that portion of the land appurtenant thereto as may reasonably be regarded as necessary for the use and enjoyment of the residence;
- (iv) a condominium unit, including any share in the common property; or
- (v) an apartment unit;

that spouses who are cohabiting consider to be their principal place of cohabitation, or that spouses who are no longer cohabiting last considered to be their principal place of cohabitation;

"matrimonial property"

(e) "matrimonial property" means any interest of one or both spouses in real or personal property;

"personal use property"

(f) "personal use property" means personal property primarily used or enjoyed by only one of the spouses, and without limiting the generality of the foregoing, includes heirlooms, antiques, works of art, clothing, jewelry or articles used in connection with a trade, business, profession or hobby;

"spouse"

(g) "spouse" means a man or a woman married to each other, and includes a party to a marriage notwithstanding that the marriage is void or voidable and, where the context so requires, includes a former spouse.

(d) "matrimonial home"

The definition of "matrimonial home" has been redrafted. There have been two substantive changes. First, spouses can have only one matrimonial home at any given time. Second, the matrimonial home no longer includes up to 65 hectares (a quarter section) of land, but only the portion of the surrounding land that is necessary for the use and enjoyment of the land. It is only the land used in conjunction with the home that should enjoy the special status of the matrimonial home. (See the discussion at pages 18-19 and 28-29 of this report.)

(e) "matrimonial property"

The definition has been simplified to include all real or personal property owned by either spouse. This is wide enough to cover the interests enumerated in the present definition.

(f) "personal use property"

This definition is new. It refers to personal items and tools of a trade. Clause 6(1)(h) permits the court to order that a spouse surrender personal use property belonging to the other spouse.

(g) "spouse"

This term is redefined in order to give the word its natural meaning. The substantive law contained in the existing definition has been moved to section 47. The present Act uses the definition of "spouse" to determine the time when an application can be brought. Subsection 21(3) of the proposed Act expressly sets out when an application may be brought.

DELETIONS

The definitions of "corporation", "matrimonial property order" and "personal representative" have also been deleted. These definitions were considered to be unnecessary. The definitions of "interspousal contract" and "value" have been deleted; these concepts have been integrated into the substantive provisions of the Act.

MATRIMONIAL HOME

Identification
of
matrimonial
home

3.-(1)

For the purposes of this Act, spouses can not have more than one matrimonial home at any time.

(2)

Matrimonial property can be the matrimonial home of spouses notwithstanding that they are not yet in occupation of the property.

(3)

On application by a spouse or other interested party, a court may determine which property, if any, is the matrimonial home.

MATRIMONIAL HOME

Section 3. Section 3 is new. Subsection 3(1) confirms that spouses can have no more than one matrimonial home at any point in time. Subsection 3(2) applies, for example, where spouses are in a temporary residence while building a matrimonial home. Both subsections represent a change from the present law. Subsection 3(3) permits a court to determine which property is the matrimonial home in doubtful cases.

DELETIONS

The heading "APPLICATION OF ACT" has been deleted and section 3 of the present Act moved to section 52. This section is not an application provision per se, but is more in the nature of a transitional provision.

PART I

POSSESSORY RIGHTS IN THE MATRIMONIAL HOME AND HOUSEHOLD GOODS

- | | | |
|---------------------|--------|---|
| Purpose | 4. | The purpose of this Part is to recognize that the matrimonial home is the shelter and focal point of the family, and that each spouse is entitled to security of possession of the matrimonial home and household goods. |
| Right to possession | 5.-(1) | Where a spouse has a right to possession of the matrimonial home or household goods, both spouses are, as between themselves, entitled to the right to possession, subject to: <ul style="list-style-type: none">(a) an order made pursuant to section 6 or section 8; or(b) any other order pertaining to possession of the matrimonial home or household goods that was made by a court of competent jurisdiction prior to the coming into force of this Act. |
| | (2) | Subject to subsection (3), the right of a spouse to possession of the matrimonial home or household goods under this section lapses: <ul style="list-style-type: none">(a) on a declaration of nullity of the marriage or a decree absolute of divorce;(b) on the death of that spouse;(c) six months after the death of the other spouse unless an application for distribution of matrimonial property has been brought; or(d) on an order for distribution of matrimonial property made under this Act or by a court of competent jurisdiction prior to the coming into force of this Act, unless the order provides otherwise. |
| | (3) | Subject to any terms or conditions it thinks fit, a court may order that a right to possession or a right to exclusive possession continue for life or for such other period as the court may order; and thereafter, notwithstanding that the spouses cease to be married, the provisions of this Part apply as if they remained married. |

PART I

POSSESSORY RIGHTS IN THE MATRIMONIAL HOME

AND HOUSEHOLD GOODS

Section 4. The purpose section is new. It gives statutory recognition to the special status of the matrimonial home. The wording is influenced by the Ontario Law Reform Commission's Report on Family Law as well as by Saskatchewan cases on the nature of the homestead.

Section 5. Subsection 5(1) simplifies section 4 of the present Act. Subject to an order of the court, if one spouse has under law a right to possession of the matrimonial home, then both spouses are entitled to share that right. It is from this equal "right to possession" that flow many of the protections of Part I. It will not, however, create any greater right in the matrimonial home than that possessed by the spouse who holds the interest in the matrimonial home.

Subsection 5(2) is new. It clarifies the law by expressly indicating when the right of a spouse to possession created by this section lapses. This is not clearly set out in the present Act. Subsection 5(3) permits a court to extend this period.

Orders
respecting
possession

6.-(1)

On application by a spouse who has a right to possession under this Part, a court may make any order it thinks fit regarding possession of the matrimonial home and household goods and, without limiting the generality of the foregoing, the court may:

- (a) subject to any terms or conditions it thinks fit, direct that a spouse be given exclusive possession of the matrimonial home or part thereof;
- (b) direct that a spouse vacate the matrimonial home;
- (c) restrain a spouse from entering or attending at or near the matrimonial home;
- (d) determine as between the spouses the liabilities and obligations in respect of the matrimonial home, including taxes, utilities, payments under a mortgage or agreement for sale, or rent;
- (e) determine as between the spouses the obligation to repair and maintain the matrimonial home;
- (f) direct that a spouse make such payment to the other spouse for the occupation of the matrimonial home as it thinks fit;
- (g) subject to any terms or conditions it thinks fit, direct that a spouse be given exclusive possession of any or all household goods;
- (h) subject to any terms or conditions it thinks fit, direct that a spouse surrender possession of personal use property of the other spouse;
- (i) restrain a spouse from removing household goods from the possession of the other spouse;
- (j) determine as between the spouses the liabilities and obligations in respect of household goods; or
- (k) direct that a spouse make such payment to the other spouse for the exclusive possession of household goods as it thinks fit.

Section 6.

Subsection 6(1) contains a revised list of orders that a court may make. Clauses 5(1)(e) and (f) of the present Act are unnecessary because of the protection afforded by the "homestead" concept which is integrated into the Act. Clause 5(1)(a) of the present Act, which authorizes the court to order that spouses are no longer bound to cohabit, is deleted. Such an order might cause confusion in determining the entitlement to maintenance under the present law, because maintenance under provincial statutes is premised on desertion (see subsection 6(5), below). Section 6 of the present Act, which deals with orders for exclusive possession of household goods, has been integrated into the list of orders in subsection 6(1). Additional powers in respect of personal use property and household goods have been added (clauses (h) and (i)).

- (2) The court may order that a police officer do such acts as may be required for the enforcement of an order made under clause (1)(b), (c), (h) or (i).
- (3) A right of a spouse in the matrimonial home or household goods arising by virtue of an order made under subsection (1) lapses when the right of the spouse to possession lapses under subsection 5(2).
- (4) An order that a spouse be given exclusive possession of the matrimonial home or household goods does not deprive the other spouse of any right under sections 10 to 12 in relation to the property.
- (5) An order that a spouse be given exclusive possession of the matrimonial home or an application by a spouse therefor does not in itself constitute a desertion of or a refusal to cohabit with the other spouse.
- (6) Where a spouse is occupying matrimonial property other than the matrimonial home, the court may on application of the spouse:
 - (a) order that the other spouse not sell, transfer, lease, mortgage or otherwise charge, convey or surrender an interest in the property; and
 - (b) make any order in respect of the property that it could make under subsection (1) in respect of a matrimonial home.
- (7) An order made under subsection (6) binds the land to the extent stipulated in the order, and a spouse who obtains such an order may register a caveat in the land titles office for the land registration district in which the land is situated.

Subsection 6(2) is new. It adopts the approach taken by the Ontario Judicature Act, which directs peace officers to enforce the orders of the court, other than orders for payment of money.

Subsection 6(3) makes it clear that an order for exclusive possession or similar order is premised upon the right to possession and exists only so long as the right to possession exists (contained in section 13 of the present Act).

Subsection 6(4) makes it clear that an order for exclusive possession granted to a spouse will not deprive the other spouse of his or her rights (e.g., the property cannot be transferred by the spouse with exclusive possession without the consent of the other spouse).

Subsection 6(5) ensures that an application for exclusive possession will not in itself be taken to constitute desertion, which would affect maintenance rights.

Subsection 6(6) permits a court to extend certain protections where a spouse takes up residence in matrimonial property that is not the matrimonial home. Sections 9 and 10 will also apply to such a residence, but the consent requirements of sections 12 to 15 are unnecessary because the spouse will have obtained an order of the court that may be registered by caveat against the land pursuant to subsection 6(7).

Considerations

7.

In exercising its powers under section 6 or 8, a court shall have regard to:

- (a) the needs of any child;
- (b) the conduct of the spouses toward each other and toward any child;
- (c) the availability of other accommodation within the financial means of either spouse;
- (d) the financial position of each spouse;
- (e) an order for maintenance of a spouse or a child made by a court of competent jurisdiction;
- (f) whether the property in question was owned by a spouse before the marriage or acquired by a spouse by gift or inheritance; or
- (g) any other fact or circumstance that affects the justice or fairness of the order.

Discharge and
variation of
orders

8.

Where an order has been made:

- (a) by a court under section 6; or
- (b) prior to the coming into force of this Act, by any court in respect of possession of the matrimonial home or household goods;

a court may, if it is satisfied that there has been a material change in circumstances, discharge or vary the order.

Provisions in
certain agreements
void

9.

Notwithstanding any other Act, where an order is made under section 6 or 8 vesting in a spouse a right to exclusive possession of matrimonial property, a provision in any security agreement, lease or contract that the rights of a contracting spouse or spouses alter or terminate on a change of possession is of no effect with respect to a change in actual possession, occupancy or use resulting from the order.

- Section 7. Section 7 sets out the considerations for the court in making an order under section 6. Clause (f) is new. The needs of the family should be the primary consideration, but if this is not a factor then the court should have regard to whether a spouse brought the home into the marriage.
- Section 8. Section 8 retains the policy of the present section 8 in permitting a variation in the order where there has been a material change in circumstances.
- Section 9. Section 9 retains the policy of section 14 of the present Act. An order of exclusive possession will not trigger provisions in leases and other agreements that provide for the termination of the agreement on a change in possession.

Right to
protect matrimonial
home 10.-(1)

Unless a court orders otherwise, a spouse who has:

- (a) a right to possession of the matrimonial home under this Part;
- (b) a right in respect of matrimonial property by virtue of an order made under subsection 6(6); or
- (c) a right to exclusive possession of household goods by virtue of an order made under this Part;

is, in any proceeding that may result in the loss of or interference with possession of the property, entitled to exercise the same rights as the other spouse with respect to such property.

- (2) A proceeding referred to in subsection (1) includes:
 - (a) foreclosure of a mortgage or cancellation of an agreement for sale;
 - (b) enforcement of a security interest or other security or cancellation or forfeiture of a lease or bailment of the property;
 - (c) distress on the property; or
 - (d) enforcement of a judgment by execution.
- (3) Where a person who brings a proceeding is required to give notice to a spouse and has knowledge that the other spouse is entitled under subsection (1) to exercise the same rights as the spouse with respect to such property, that person shall give like notice to the other spouse.
- (4) Where a spouse is in occupation of matrimonial property, the matrimonial property is exempt from execution by creditors of the other spouse in the same manner and to the same extent as if the other spouse were in occupation of the property.

Section 10.

Section 10 extends the scope of section 15 of the present Act, which provides that a spouse with an exclusive possession order has the same rights against third parties as the owning spouse. Under section 10 either spouse is entitled to defend proceedings that may result in the loss or interference with the matrimonial home, whether or not an exclusive possession order has been made. A similar entitlement in respect of household goods is only extended where an order for exclusive possession has been obtained.

Subsection 10(3) provides that a third party must give notice to the non-owning spouse if the third party knows that the spouse has possessory rights in the property. Under the present Act, notice is required whether or not there is knowledge of the exclusive possession order.

Subsection 10(4) makes it clear that the residence of the family is exempt from execution even though the debtor spouse who has title to the property may no longer be residing there.

Alienation
of household
goods

11.-(1)

Subject to section 15, no spouse shall dispose of or encumber household goods that are subject to an order giving exclusive possession of them to the other spouse without the consent of the other spouse.

(2)

Where a spouse disposes of or encumbers household goods contrary to subsection (1), a court on application may set aside the transaction if the purchaser had knowledge of the order.

Alienation
of matrimonial
home

12.-(1)

Subject to section 15, no spouse or corporation controlled by a spouse shall sell, transfer, lease, mortgage or otherwise charge, convey or surrender an interest in the matrimonial home in which the other spouse has a right to possession under this Part without the consent of the other spouse.

(2)

The consent referred to in subsection (1) shall be evidenced by:

- (a) a consent in Form A made by the spouse, annexed to or endorsed upon the instrument, together with an affidavit of execution thereof;
- (b) an affidavit in Form B of the spouse making the instrument stating that the consent of the other spouse is not required under the terms of an agreement signed by the spouses, each of whom has obtained independent legal advice as to the nature of the agreement and its effect on the rights of the spouses under this Act; or
- (c) execution of an instrument by both spouses as joint tenants or tenants in common in the property referred to in the instrument, in which it is stated that the joint tenants or tenants in common are spouses of each other.

Section 11. Section 11 is new. The section protects possessory rights in household goods where an exclusive possession order is obtained.

Section 12. Sections 12 to 17 replace The Homesteads Act and sections 9 to 12 of the present. The registration provisions of the present Matrimonial Property Act are of limited application. They apply only where an exclusive possession order is obtained, which then must be registered against the land. Sections 12 to 17 have a much wider application. They apply to all matrimonial homes and not only to those against which an order has been registered. The sections are based upon a modernized "homesteads" concept; the traditional homesteads protections are made applicable to the matrimonial home. (See discussion at pages 17-23 of this report.)

Subsection 12(2) sets out the general conveyancing requirements. The homesteads examination is no longer required. In its place is the requirement that there be a consent signed by the spouse and witnessed. The consent is not required if the spouses have contracted out of the Act and each has obtained independent legal advice. Nor is the consent required if the spouses are joint tenants and the document on its face indicates that they are spouses. The consent form is not necessary in these two cases because spousal consent is exhibited elsewhere.

- (3) A consent in Form A may be made on behalf of a spouse by:
 - (a) a person, other than the other spouse, who is authorized by power of attorney to do so; or
 - (b) a committee of the spouse authorized to do so.
- (4) An instrument, other than an instrument made by a corporation, shall not be accepted for registration under The Land Titles Act unless:
 - (a) it is evidenced by a consent made in accordance with subsection (2); or
 - (b) it is accompanied by an affidavit in Form C of the person making the instrument stating that to the best of that person's knowledge, information and belief no part of the land described in the instrument is that person's matrimonial home.

Powers of
court respecting
alienation 13.-(1)
of matrimonial
home

Subject to subsection (2), a court shall, on application by a spouse, set aside any sale, transfer, lease, mortgage or other instrument that does not comply with section 12, unless the court has dispensed with consent under section 15.

- (2) A court shall not set aside any transaction in which a person for value without knowledge of a right of a spouse to possession has acquired an interest in the matrimonial home.
- (3) For the purposes of subsection (2), a person is deemed to have knowledge that a matrimonial home is one in which a spouse has a right to possession under this part if a matrimonial home caveat under section 16 has been registered against the certificate of title to the land.

Knowledge 14.

For the purposes of this Part, a person has knowledge when information comes to the attention of that person under circumstances in which a reasonable person would take cognizance of it.

Subsection 12(3) allows a person acting under a power of attorney or a committee to consent on behalf of a spouse. This was not possible under The Homesteads Act.

Subsection 12(4) provides that the instrument will not be registrable unless it evidences a form of consent or is accompanied by an affidavit stating that the property is not that person's matrimonial home. It is important to note that there are no conveyancing requirements in respect of corporations. It would be too onerous to demand that all corporations comply with these formalities in order to cover a relatively rare case. A corporation controlled by a spouse is prohibited from transferring the spouses' matrimonial home, but if it does so the remedy is an action by the spouse against the other spouse or the corporation. Furthermore, the spouse may file a matrimonial home caveat in respect of the property, and this will prevent any dealings with the property. Even where a matrimonial home caveat is not filed, the transaction may be set aside if the purchaser knew that the property was the matrimonial home.

Section 13.

Section 13 sets out the powers of the court where the conveyancing requirements have not been complied with. The court may set aside the transaction except where a bona fide purchaser for value without notice has taken an interest in the matrimonial home. If a matrimonial home caveat has been filed under section 16, a purchaser is deemed to know that the property was the matrimonial home. The effect of non-compliance is unclear under The Homesteads Act.

Section 14.

Section 14 provides that an objective test of knowledge is to be applied.

Court may
dispense with
consent 15.

On application by a spouse or other interested party, a court may order that sections 11 to 13 not apply to a sale, transfer, lease, mortgage, security agreement or other instrument or transaction referred to in the order, whether or not such instrument or transaction has been completed, if:

- (a) the instrument or transaction is not detrimental to the spouse whose consent would otherwise be required;
- (b) the spouse whose consent would otherwise be required cannot be located;
- (c) the spouse whose consent would otherwise be required has led the other party to the transaction to believe that the spouse consented to the transaction;
- (d) a spouse is unreasonably withholding consent;
- (e) the spouses have signed an agreement that provides for the possession or distribution of the matrimonial home or household goods; or
- (f) where the property is owned by a corporation that is controlled by a spouse, it would be unfair to a minority shareholder not to grant the order.

Matrimonial
home caveat 16.-(1)

A spouse may register a matrimonial home caveat in Form D in the land titles office for the land registration district in which the land is situated claiming that the land described therein is or includes the matrimonial home in which the spouse has a right to possession under this Part.

- (2) A withdrawal of a matrimonial home caveat shall be in Form E and shall be accompanied by an affidavit of execution.
- (3) A spouse shall not maintain more than one matrimonial home caveat.

Section 15.

Section 15 expressly sets out the circumstances where the court may waive compliance with the Act. The grounds upon which consent may be dispensed with are significantly wider than those in The Homesteads Act. The court may waive compliance whether or not the transaction has been completed. These factors attempt to strike a balance between the policy of protecting the security of the home and the unfairness created if a spouse is permitted to abuse these rights.

Section 16.

Section 16 provides for a matrimonial home caveat. At present, a caveat may be filed under The Homesteads Act, but the effect of a homestead caveat is unclear. The effect of a matrimonial home caveat is not to "register" an interest in land, but rather to give notice so as to trigger section 13. Because spouses can have only one matrimonial home, only one matrimonial home caveat can be filed.

Discharge
of matrimonial
home caveat 17.-(1)

On application by a spouse or other interested party, a court may order the discharge of a matrimonial home caveat if it is satisfied that the spouse does not have a right to possession under this Part.

- (2) A spouse who has an interest in land against which a matrimonial home caveat has been registered may serve on the other spouse a notice in Form F that the matrimonial home caveat will lapse unless an order of the court continuing the matrimonial home caveat is filed within 30 days with the registrar of land titles for the land registration district in which the land is situated.
- (3) A notice in Form F shall be personally served by a person other than the spouse, on the other spouse or on the personal representative of the other spouse, and shall state an address in Saskatchewan for service; and thereafter service of an application for an order continuing the matrimonial home caveat may be effected by personal service or by service at the address for service.
- (4) The registrar shall, on receiving a true copy of a notice in Form F together with proof of personal service on the spouse discharge the matrimonial home caveat 30 days after personal service on the spouse, unless an order of the court continuing the matrimonial home caveat is filed with the registrar.

Action for
damages 18.

Where a spouse without reasonable cause breaches the provisions of this Part or fails to comply with an order made under this Part, the other spouse may in an action for damages recover loss sustained as a result of the breach or non-compliance.

- Section 17. *Section 17 provides a mechanism for lapsing or discharging a matrimonial home caveat. Unlike the discharging of a homesteads caveat, a court application is not always necessary. The lapsing procedure is similar to that for ordinary caveats, except that personal service is required. This is necessary to avoid interception of the notice by the other spouse, which might occur if service by mail were permitted.*
- Section 18. *Section 18 is substantially the same as section 19 of the present Act.*

DELETIONS

Sections 9, 10, 11, 12 and 16 of the present Act have been deleted and replaced by a reformulation of The Homesteads Act. Section 17 of the present Act, which provided for a more restricted test for bringing ex parte applications, has been deleted in favour of the usual rule: under the Rules of Court, an ex parte application may be brought if delay would entail "an irreparable or serious mischief". Section 18 of the present Act creates offence provisions. Such quasi-criminal provisions are undesirable in family law matters, and in any case are seldom used. The availability of a civil action for damages, contempt proceedings and court-ordered police enforcement should suffice.

PART II
DISTRIBUTION OF MATRIMONIAL PROPERTY

Interpretation

19.

In this Part:

"contribution"

(a) "contribution" by a spouse means a contribution:

- (i) to the marriage or to the welfare of the family, including any contribution made as a homemaker or parent; or
- (ii) directly or indirectly to the acquisition, disposition, preservation, maintenance, improvement, operation or management of matrimonial property;

"date of valuation"

(b) "date of valuation" means:

- (i) if the spouses are not cohabiting, the date of separation of the spouses; or
- (ii) if the spouses are cohabiting, the date of the application for distribution;

"dissipation"

(c) "dissipation" means:

- (i) an extravagant or wasteful dealing by a spouse with matrimonial property; or
- (ii) a substantial gift by a spouse of matrimonial property;

made without the consent of the other spouse; but does not include a dealing with or gift of property brought into marriage by that spouse that is exempt from division under this Part.

"gift"

(d) "gift" includes a sale or other disposition for less than fair market value made with the intention of benefitting the transferee, to the extent that the fair market value exceeds the consideration received from the sale or other disposition;

PART II

DISTRIBUTION OF MATRIMONIAL PROPERTY

Section 19.

Section 19 contains the definitions of terms used only in Part II.

(a) "contribution"

This definition is new. It has a very wide scope and clearly includes the indirect (but very real) contributions of homemakers and parents.

- Cross reference ss. 20, 25(a) & (b), 27(1)(a).

(b) "date of valuation"

This definition is new. It indicates that the date for valuing property for purposes of division is the date that the spouses separate (or the date of the application if they continue to cohabit).

- Cross reference ss. 27(1), 28(2).

(c) "dissipation"

This term is redefined. It refers to extravagant or wasteful dealings with property and therefore does not include bona fide but unwise business decisions. Also included is a substantial gift of matrimonial property. An act may constitute dissipation only if made without the consent of the other spouse.

- Cross reference ss. 25(c), 27(1)(b), 35.

(d) "gift"

This definition is new. It recognizes that a sale at less than fair market value is in part a gift.

- Cross reference ss. 19(c)(ii) & (e)(ii), 34.

"property brought into marriage"

- (e) "property brought into marriage" means property or an interest in property:
- (i) owned or held by one spouse at the time of marriage;
 - (ii) acquired after the time of marriage by one spouse by inheritance or gift from a third party, unless the inheritance or gift was intended for both spouses;
 - (iii) received after the time of marriage by one spouse as an award or settlement of damages or under a policy of insurance, in respect of personal injuries or defamation suffered by that spouse, except to the extent that the payment is for loss of income of the spouse during the period between the time of marriage and the date of valuation.

Purpose

20.

The purpose of this Part is to recognize that child care, household management and financial provision are the joint and mutual responsibilities of the spouses and that the contribution of the spouses to these responsibilities entitles each spouse to an equal division of the matrimonial property, subject to the exceptions, exemptions and equitable considerations mentioned in this Part.

Application
by spouse

21.-(1)

A spouse may apply for distribution of matrimonial property where:

- (a) the last place of cohabitation of the spouses was in the province; or
- (b) having regard to all the circumstances, it is reasonable and convenient that the application be heard by the court;

and on such application the court shall distribute the matrimonial property.

(e) "property brought into marriage"

This term is new. It is used to describe the property that is exempt from division. Note that gifts and inheritances received after marriage are included in the definition: a gift or inheritance is exempt unless there is something to indicate that it was intended for both spouses. Under the present Act, such gifts and inheritances are shareable. (See the discussions at pages 47 and 49-50 of this report.)

The term also encompasses damages for personal injury, but unlike the present Act's exemption excludes damages for loss of income. Another change is that property brought into marriage includes damages for defamation of character.

- Cross reference ss. 19(c), 23, 24.

Section 20.

The purpose section is substantially the same as that in the present Act. It no longer refers to indirect or non-financial contribution, because the definition of "contribution" in the proposed Act specifically includes indirect contributions such as the work of a homemaker or parent.

Section 21.

Section 21 is new. Subsection 21(1) is a jurisdiction provision. The general rule is that the court has jurisdiction where Saskatchewan was the last place of cohabitation of the spouses. The Court also has jurisdiction where Saskatchewan was the last place of cohabitation of the spouses. The Court also has discretion to hear other applications if it is the forum conveniens. This is particularly useful in light of the differing conflict of laws rules of other provinces.

- (2) The court shall not order the distribution of matrimonial property situated outside the province, or order payment to a spouse of an amount that, together with the value of property distributed to that spouse, exceeds the value of matrimonial property situated in the province at the date of the order.
- (3) No application may be brought by a spouse after a declaration of nullity of the marriage or a decree absolute of divorce.

Choice
of law

22.

The distribution of matrimonial property is governed by the internal law of the last place of cohabitation of the spouses or, if they have never cohabited, by the internal law of the place to which they had the most substantial connection at the time of their marriage.

Matrimonial
home brought
into
marriage

23.-(1)

Where property brought into marriage is used as the matrimonial home, only the equity in the property at the time it became the matrimonial home is exempt from distribution.

(2)

In subsection (1), "equity" means the amount by which the value of property exceeds the encumbrances against it.

Other
property
brought
into
marriage

24.-(1)

Where property other than property used as the matrimonial home is brought into marriage, the property including any appreciation of the property is exempt from division.

(2)

Where property referred to in subsection (1) is disposed of during the course of the marriage:

- (a) the proceeds and any appreciation of the proceeds are exempt from division, if the proceeds can readily be identified; or
- (b) the value of the property at the date of disposition is exempt from division, if the proceeds cannot readily be identified.

Subsection 21(2) makes it clear that the province cannot order the distribution of out-of-province property. Such an order would exceed the constitutional jurisdiction of the court. The value of such property, however, is divisible, since it is matrimonial property; the distribution of assets in the province will take its value into account. This gives the court greater guidance than did clause 21(2)(p) of the present Act, which simply referred to out-of-province property as a factor the court should consider in making an unequal division. It should also be noted that clause 27(1)(g) of the proposed Act directs the court to consider an order of a foreign court distributing matrimonial property.

Subsection 21(3) expressly provides that the application must be brought before the decree absolute of divorce or declaration of nullity. The present Act relies on the definition of "spouse" to imply this rule.

Section 22.

Section 22 is new. It determines whether Saskatchewan law or the law of some other jurisdiction should be applied on an application for distribution of matrimonial property situated in Saskatchewan. The choice of law is governed by the spouses' last place of cohabitation. This is substantially the same as the provision in the Ontario Family Law Reform Act. This section and section 21 set out the jurisdictional and choice of law rules so as to bring certainty into an area where conflict of laws problems can be very difficult.

Section 23.

Section 23 alters the position taken by section 22 of the present Act, which provides that property brought into marriage that is used as the matrimonial home is exempt. (See also subsection 24(3).) Thus, any increase in value is shareable under section 26. (See the discussions at pages 44-47 of this report.)

Section 24.

Section 24 sets out the basic exemptions rule. Property brought into marriage and any appreciation thereon is exempt from division. If the property was disposed of, its proceeds, if identifiable, are exempt. If the proceeds are not identifiable then the value at disposition is exempt. However if the exempt property is expended, its value is exempt only to the extent that it was used for the benefit of the spouses.

The exemptions rules in the present Act are drawn very narrowly. Only the value at the date of marriage is exempt. In addition, even where the property brought into marriage is used for the benefit of the spouses, the exemption will be lost unless the property exchanged for such property can be identified.

- (3) Where property brought into marriage or its proceeds are used to purchase a matrimonial home, the value of the property at the date of purchase of the matrimonial home is exempt from division.
- (4) Where property referred to in subsection (1) has been expended or its value diminished for the benefit of the spouses, the value of that benefit is exempt from division.

Where
exemption
unfair

25.

Where an exemption under section 23 or 24 would be unfair, having regard to:

- (a) contribution by either spouse during the course of marriage in respect of property brought into marriage;
- (b) contribution by a spouse prior to the marriage;
- (c) dissipation of matrimonial property by a spouse;
- (d) debts or liabilities owed by a spouse at the time of the marriage that were paid during the course of the marriage; and
- (e) a transfer of property brought into marriage to the other spouse or to the spouses jointly;

the court may adjust the exemption as it thinks fair.

Division of
matrimonial
home

26.

Subject to section 23, the matrimonial home shall be divided equally between the spouses unless it would be unfair to do so having regard only to any extraordinary circumstance.

For a comparison of the exemptions provisions in the proposed Act and the present Act, see pages 47-50 of this report.

Section 25.

Section 25 sets out the circumstances under which a court may adjust an exemption. This section should be used to adjust the exemption created by section 24 where it is the spouses' efforts that have created an increase in value. Subsection 23(4) of the present Act permits a court to disallow an exemption, but because the exemptions were drawn so narrowly, this wide provision has rarely been applied. The expanded exemptions contained in the proposed Act make it necessary to more clearly articulate reasons for adjusting the exemption.

Clause 25(a) permits the court to consider a contribution by either spouse that results in an increase in value, or prevents a decrease in value. An exemption should be reduced, for example, where spouse A relies on the efforts of spouse B to maintain the family, while the efforts of spouse A are directed to increasing the value of spouse A's exempt property. This provision permits a broad discretion to be exercised to achieve a fair result.

The other clauses enumerate other circumstances where a full exemption would be unfair. Contributions by the non-owning spouse prior to the marriage should be considered. If shareable matrimonial property is dissipated by a spouse, it may be unfair to permit that spouse to claim the full exemption. Debts brought into the marriage that are paid off with matrimonial property should also be deducted from that spouse's exemptions. Finally, a transfer of property to the other spouse or into the spouses' joint names often indicates that the spouses have agreed to treat the property as a shareable joint asset.

Section 26.

Section 26 sets forth the general rule for the division of the matrimonial home: the value of the matrimonial home is divided equally unless there are extraordinary circumstances. This is substantially the same as section 22 of the present Act, except that the present Act also permits an unequal division in favour of the spouse with custody of the children. Protection of the interests of the children is achieved in the proposed Act through possession orders; see subsection 29(2).

Division of other
matrimonial
property

27.-(1)

The court shall divide equally between the spouses the value, at the date of valuation, of the matrimonial property then owned by the spouses, other than the matrimonial home and exempt property, unless it would be unfair to do so, having regard to:

- (a) a substantial failure of a spouse to make the contribution that would ordinarily be expected of that spouse in the circumstances of the marriage;
- (b) dissipation of matrimonial property by a spouse;
- (c) a diversion of the economic resources of the spouses towards the education of one spouse;
- (d) the length of time the spouses lived separate and apart from the time of marriage to the date of valuation;
- (e) debts or liabilities owed by a spouse at the time of marriage that were paid during the course of the marriage;
- (f) debts or liabilities incurred during the course of the marriage in the name of one of the spouses;
- (g) any order for distribution of matrimonial property made by a foreign court of competent jurisdiction; and
- (h) any other fact or circumstance that affects the justice or fairness of the division.

- (2) The court shall not make a division of matrimonial property that would unfairly prejudice creditors in respect of debts and liabilities incurred during the course of marriage for the benefit of the spouses or for the purpose of acquiring matrimonial property.

28.

In making a division of matrimonial property, the court shall not have regard to immoral or improper conduct on the part of a spouse unless that conduct amounts to dissipation or has otherwise been substantially detrimental to the financial standing of one or both spouses.

Section 27.

Section 27 incorporates the presumption of equal sharing contained in subsection 21(1) of the present Act. (See the discussion at pages 24-26 of this report.)

Section 27 also attempts to rationalize the list of factors contained in subsection 21(2) of the present Act. Clauses 21(2)(a), (c), (h), (j), (l) and (p) of the present Act are specifically dealt with elsewhere in the proposed Act and are no longer merely factors. Clauses (b), (d) and (e) are no longer necessary in light of the revised exemptions policy. Clause (f) which referred to contributions to the career potential of the other spouse, is replaced in the proposed Act by clause (c). Clauses (g) and (m) are relevant to maintenance, but not to division of property. Clause (n) is unnecessary, because third party interests are not matrimonial property in any event. These factors have accordingly been deleted. Clause (a) of the proposed Act is new. (See the discussion at pages 26-28 of this report.)

Because it is not worth that is divided, creditors' rights should not ordinarily be prejudiced by a distribution of matrimonial property. Subsection 27(2) underlines this principle.

Section 28.

Section 28 is substantially the same as section 25 of the present Act.

Orders for
distribution

29.-(1)

The court shall distribute matrimonial property owned by the spouses at the date the order is made in a manner that will carry out the division under sections 26 and 27.

(2)

In distributing the matrimonial property, the court shall where appropriate make an adjustment for any use of, benefit from, and increase or decrease in value of the matrimonial property between the date of valuation and the date the order is made.

(3)

The court may make any order it considers fit in carrying out a distribution of matrimonial property, and without limiting the generality of the foregoing, may:

- (a) order a spouse to pay money in a lump sum or over a period of time;
- (b) order the vesting of matrimonial property in one spouse or in both spouses in common;
- (c) order a registrar of land titles to cancel, correct, substitute or issue any certificate of title or make any memorandum or entry thereon;
- (d) order that matrimonial property be sold on such terms or conditions as the court directs, and that the proceeds be distributed between the spouses as the court directs;
- (e) order the partition or severance of matrimonial property;
- (f) declare that a spouse holds matrimonial property in trust for the other spouse or for both spouses, and prescribe the terms and conditions of the trust;
- (g) order a spouse to give security, including a charge on property, for the performance of any obligation imposed by an order made under this section, subject to any terms or conditions the court thinks fit;
- (h) make an order respecting possession of matrimonial property by a spouse, subject to any terms or conditions the court thinks fit;
- (i) make, continue, vary, or discharge an order made under Part I.

Section 29.

Section 29 makes an important distinction between division and distribution. Under section 27 property is divided at the date of valuation (usually separation). This date is chosen because it is at this point that the partnership is in fact terminated and joint contributions cease to be made. It is at this date that each spouse's entitlement to property is determined. However, the property that is actually distributed in accordance with that determination can only be that which is owned at the date of the order.

Subsection 29(2) directs the court to make adjustments to reflect changes in value and any benefit obtained by a spouse between these dates. The kinds of adjustments that should be made have been deliberately left open in order to give the court sufficient flexibility to deal with the various contingencies during the post-separation period. In most cases the adjustments will be relatively easy; however, in cases where there is a long period between separation and the date of the order there will be more difficulty.

Subsection 29(3), listing the orders that a court may make, streamlines the list in section 26 of the present Act. It brings greater clarity to the legislation without reducing the scope of orders that may be made.

Clause 29(3)(i) is new. The present Act permits possessory orders to be made upon distribution, but does not expressly permit orders for exclusive possession of the matrimonial home. Exclusive possession orders trigger certain protections under Part I of the Act.

- (4) Where an order under clause 29(3)(f), (g), (h) or (i) or other order deferring distribution has been made, a spouse named in the order or the personal representative of the spouse may, if there has been a material change in circumstances, apply to the court to vary, amend or discharge the order.

Distribution
of certain
assets

30.-(1)

Where distribution of matrimonial property used for business or farming purposes would:

- (a) substantially affect the livelihood of a spouse; or
- (b) substantially impair the viability of a business or farm;

the court shall make an order under clause 29(3)(f), (g) or (h) or other order deferring distribution, if it would avoid those consequences, unless it would be unfair or impractical to do so.

- (2) Where distribution of the matrimonial home would be disruptive or damaging to the welfare of a child, the court shall make an order under clause 29(3)(f), (g), (h) or (i) or other order deferring distribution, if it would avoid those consequences, unless it would be unfair or impractical to do so.

- (3) Where a spouse has an interest in a corporation or partnership and it would be unreasonable to distribute to the other spouse shares in the corporation or an interest in the partnership, the court shall order payment of a sum of money or distribute other matrimonial property to the other spouse in lieu of distributing the interest in the corporation or partnership.

Tax consequences
of distribution

31.-(1)

In distributing the matrimonial property, the court shall make allowance for the tax consequences arising directly or indirectly from the distribution.

- (2) The court may, on ordering distribution of matrimonial property, give leave to the spouses to reapply after the distribution of matrimonial property has been completed for an order to vary an allowance made by the court for tax consequences in light of the actual tax consequences of the distribution.

Subsection 29(4) is new. Because of the continuing nature of orders made under clauses 29(3)(f) to (i), subsection 29(4) allows an application to vary such an order.

Section 30 .

Section 30 is new. Subsection 30(1) directs the court to defer distribution to avoid disruption of the income-earning capacity of a spouse, unless it would be unfair to so order. This will not alter the division. It will merely delay it or spread its effect over a period of time.

Subsection 30(2) permits the court to defer distribution of the matrimonial home if necessary for the welfare of a child. The court may defer distribution in the interests of the children, but it should not use this as a factor in determining the share that each spouse is to receive. Both subsections (1) and (2) recognize that property acquired during marriage is divided because each spouse has earned a share in the property. It is this, and not the needs of the spouse--whether they be the needs of a farmer or businessman who requires the property to produce an income, or the needs of a custodial spouse who requires the property to raise the children--that creates the entitlement to property. (See the discussion at pages 58-62 of this report.)

Subsection 30(3) incorporates subsection 26(3) of the present Act, but is extended to cover partnerships in addition to corporations.

Section 31.

Section 31 is new. It specifically directs the court to consider the tax consequences of the division. Because it will not always be possible to predict in advance what the tax consequences will be, the court may upon distributing the property give leave to reapply after actual tax consequences become known.

Distribution of
pensions 32.-(1)

In distributing an interest of a spouse in a pension plan, the court may:

- (a) declare that the spouse holds the pension rights in trust for the spouses on such terms and conditions as the court directs;
- (b) vest in the other spouse an interest in the pension rights, and order that the employer, upon receiving notice of the order, not pay any sum to the employee spouse under the pension plan except in accordance with the terms of the order; or
- (c) divide the value of the pension rights according to section 27, and order:
 - (i) payment of the other spouse's share of the pension rights in a lump sum or instalments; or
 - (ii) distribution of other matrimonial property to the other spouse.

(2) For the purpose of clause (1)(c), and subject to subsection (3), the value accumulating during marriage of a spouse's interest in a pension plan shall be deemed to equal the total contributions made by the spouse from the date of marriage to the date of valuation, together with:

- (a) the amount earned from investment of such contributions if the plan is a money accumulation plan; or
- (b) a reasonable rate of interest in respect of such contributions if the plan is other than a money accumulation plan.

(3) Where the pension plan is non-contributory, or where the employer contributions significantly exceed the contributions of the spouse, the court may attribute to the spouse a portion of the employer's contributions not exceeding one half of the total contributions made during the marriage, having regard to the date the pension rights vest, other terms of the plan, and the circumstances of the employment relationship.

(4) In subsection (3), "contributions" includes monies paid in or committed to a funded pension plan, or an employer's notional contribution to a non-funded pension plan.

Section 32.

Section 32 is new. Its inclusion makes it clear that rights in a pension plan are matrimonial property. Subsection 32(1) provides that the court may defer distribution by declaring that the spouse holds pension rights in trust for the other spouse, or by vesting in the other spouse an interest in the pension plan. The court may also value and distribute the pension rights.

There are a number of contingencies that make the valuing of pensions difficult and imprecise. (See the discussion at pages 62-76 of this report.) Subsections (2) and (3) provide a formula for valuing pension rights. The court is directed to divide the employee contributions made during the marriage, together with an appropriate rate of interest. The table of interest rates published annually in the Gazette pursuant to The Pension Benefits Act may provide some guidance in this regard. Subsection (3) permits the court to deem up to one-half of the contributions to be employee contributions in appropriate circumstances.

Re-application
in certain
cases 33.

On application by a spouse, the court may vary, amend or discharge an order made under this Part or under The Married Persons' Property Act or The Married Women's Property Act if:

- (a) the spouses were cohabiting at the date the order was made;
- (b) the spouses are still married to each other; and
- (c) there has been a material change in circumstances that warrants a variation, amendment or discharge.

Financial
disclosure 34.-(1)

Where an application for distribution has been made, each spouse shall file with the court and serve on the other spouse a sworn statement disclosing particulars of:

- (a) all the matrimonial property of the spouse situated in or outside the province;
- (b) any substantial disposition of property by the spouse within two years prior to the commencement of the application; and
- (c) all debts and liabilities of the spouse;

unless the spouses agree to dispense with disclosure or the court orders otherwise.

- (2) The court may order that a statement referred to in subsection (1) and any cross-examination on it be excluded from the public record.

Section 33.

Section 33 alters subclause 26(1)(b)(xvi) of the present Act. A variation in an order distributing matrimonial property (other than an order deferring distribution which may be varied under subsection 29(4)) may only be made if the spouses were married and cohabiting when the application was made. Unless an order for deferred distribution is made, the distribution should be a final determination of each spouse's entitlement to the property. Subsequent changes in circumstances, although they may justify a variation in a maintenance order, are irrelevant in determining a spouse's entitlement to matrimonial property.

Section 34.

Section 34 requires financial disclosure except where dispensed with by court order or agreement between the spouses. Section 27 of the present Act requires financial disclosure only where the court so orders, but in practice the disclosure is required as a matter of course.

DELETIONS

Section 24 of the present Act is deleted. The effect of agreements between spouses is fully covered in Part IV of the proposed Act.

DISSIPATION OF MATRIMONIAL PROPERTY

Gift to
third party 35.-(1)

Where a spouse has made a gift of matrimonial property without the consent of the other spouse, and the recipient of the gift knew or ought to have known that the gift was made with the intention of impairing a claim under this Act, the court, on an application for distribution, may:

- (a) subject to any terms or conditions it thinks fit, order the recipient of the gift to pay or transfer all or part of the property to a spouse; or
- (b) give judgment in favour of a spouse against the recipient of the gift for a sum not exceeding the amount by which the share of that spouse under the distribution of matrimonial property is reduced as a result of the gift.

(2)

A spouse who applies for an order under subsection (1) shall serve the recipient of the gift with notice of the application setting out the nature of the claim against the recipient and the allegations on which the claim is based; and thereafter the recipient is deemed to be a party in the application in respect of that claim.

Orders
restraining
dissipation 36.

In or pending an application for distribution, the court may make such interim order as it considers necessary for restraining the dissipation of matrimonial property or for the possession, delivering up, safekeeping and preservation of matrimonial property.

DISSIPATION

Section 35.

The complex rules set out in section 28 of the present Act are substantially simplified and recast in section 35. Section 35 deals with gifts (including dispositions at less than fair market value) made to third parties. The present Act provides a limitation rule which prohibits the setting aside of a transaction if it is made more than two years prior to the date of application. This rule is deleted. In the proposed Act, such transactions may only be set aside if the transferee knew it was intended to impair a spouse's claim. There is no reason to afford a special limitation period to a fraudulent transferee.

The present Act also makes a distinction between gifts and sales at less than fair market value. Although such a distinction is recognized by the rules of equity, it should not be perpetuated in respect of matrimonial property. It is only when the recipient knew or ought to have known the gift was made with improper motives that it should be set aside.

Section 36.

Section 36 is based on a similar Ontario provision. It makes it clear that a restraining order can be applied for only if an application for distribution has been commenced or is about to be commenced. Section 29 of the present Act is unclear on this point.

The proposed formulation will also give the court greater flexibility as an order may be made for the safekeeping or possession of property even though it is not convinced that the failure to do so will result in dissipation. Under the present Act, orders under section 29 may only be made if the spouse is about to dissipate property or abscond from the jurisdiction.

PART III

APPLICATION ON DEATH OF SPOUSE

Application on
death of
spouse

- 37.-(1) An application for distribution of matrimonial property may be:
- (a) brought by a surviving spouse within six months after the grant of probate or letters of administration of the estate of the deceased spouse;
 - (b) continued by a surviving spouse after the death of the other spouse; or
 - (c) continued by the personal representative of a deceased spouse.
- (2) A surviving spouse who brings or continues an application for distribution shall, unless the court orders otherwise, give notice of the application to any beneficiary of the deceased spouse under a will or under The Intestate Succession Act.
- (3) The property of a deceased spouse is matrimonial property whether or not it has vested in the personal representative, and except as provided in this Part is subject to division in accordance with Part II.

Distribution
on death of
spouse

- 38.-(1) Unless a contrary intention appears from the will of a deceased spouse, the entitlement of the surviving spouse under this Act to a distribution of property owned by the deceased spouse is reduced by the entitlement of the surviving spouse under the will or under The Intestate Succession Act.
- (2) Unless the court orders otherwise, the incidence of an order for distribution of matrimonial property made after the death of a spouse falls rateably upon the whole estate, other than the portion of the estate to which the surviving spouse is entitled.
- (3) In distributing matrimonial property, the court shall not direct the transfer to the surviving spouse of property that is the subject matter of a specific bequest to a beneficiary other than the surviving spouse, unless a fair division of matrimonial property cannot otherwise be achieved.

PART III

APPLICATION ON DEATH OF SPOUSE

Section 37.

Subsection 37(1) sets out the circumstances under which an application may be brought or continued after death of a spouse. It substantially incorporates subsections 30(1) and (2) of the present Act. Subsection 37(2) is new. It requires that notice be given to beneficiaries. The beneficiaries will often be interested because a matrimonial property application may have the effect of decreasing their share of the estate.

Subsection 37(3) is new. It makes it clear that an order for distribution should be made on the same principles and on the same basis as an order made between living spouses. Under the present Act, the courts have sometimes considered the death of a spouse to be a circumstance justifying an increase in the share of the surviving spouse. Such an approach is inconsistent with principles on which matrimonial property legislation is based.

Section 38.

Subsection 38(1) sets out a new rule. A spouse's entitlement to matrimonial property is reduced by the amount received under a will or on an intestacy. (This provision is discussed at pages 77-82 of this report. See also the proposed Intestate Succession Amendment Act, 1984.)

Subsection 38(2) is new. It adopts the approach of The Dependants' Relief Act in making the incidence of the order fall rateably on the estate. A matrimonial property order, like a dependants' relief order, disrupts the distribution intended by the testator. The effect should be spread among all the beneficiaries rather than borne by the residual legatee.

Subsection 38(3) is new. It provides that property given under a specific bequest should not be distributed to a spouse unless it is necessary to do so. If the court were to order that property given under a specific bequest be transferred to the spouse, the beneficiary would lose all entitlement. This would substantially defeat the testator's intention. Where there are specific bequests, a money judgment, which by subsection 38(2) would fall rateably on the whole estate, would be preferable.

Personal
representative
of deceased
spouse

39. -(1)

The personal representative of a deceased spouse shall not, without the consent of the surviving spouse or an order of the court, proceed with distribution of the estate until after the expiration of six months from the grant of probate or letters of administration of the estate of the deceased spouse or, where an application has been brought for distribution of the matrimonial property, until the application has been disposed of.

(2)

A personal representative who distributes any portion of the estate contrary to subsection (1) is personally liable to the surviving spouse for any loss suffered by the surviving spouse as a result of that distribution.

(3)

Unless the court orders otherwise, a personal representative may proceed with payment of debts and liabilities of the deceased spouse whether or not an application has been brought for distribution of matrimonial property.

Settlement by
personal
representative

40.

No settlement or agreement made by a surviving spouse with the personal representative respecting the distribution of matrimonial property is binding unless confirmed by the court.

Distributed
property not
part of estate

41.

Where an order distributing matrimonial property is made, money paid or property transferred to a surviving spouse pursuant to the order is deemed to have never been part of the estate of the deceased spouse in respect of a claim made against the estate by:

(a) a beneficiary under a will;

(b) a beneficiary under The Intestate Succession Act;

(c) a dependant under The Dependants' Relief Act; or

(d) any creditor of the deceased spouse or of the estate.

- Section 39. *Section 39 replaces sections 32 and 33 of the present Act, and clarifies the position of the personal representative. The personal representative must wait six months before distributing the estate. This permits the surviving spouse to bring a matrimonial property application (and it is also the time period within which a dependants' relief application must be brought). The personal representative may, however, pay out debts and liabilities, unless the court orders otherwise, because it is net worth that is generally divided on matrimonial property applications.*
- Section 40. *Section 40 expands subsection 34(3) of the present Act. The proposed section provides that any settlement between the personal representative and the surviving necessary to ensure that the settlement neither prejudices beneficiaries nor involves an unconscionable dealing with the surviving spouse.*
- Section 41. *Section 41 substantially adopts section 35 of the existing Act. An order distributing matrimonial property extinguishes the rights of creditors, beneficiaries and others to have recourse against that property (but claims of creditors should be considered under subsection 27(2) in dividing the property).*

DELETIONS

Section 36 of the present Act provides that certain rights do not survive death. The proposed Act integrates these rules into the substantive provisions of the Act (see subsections 5(2) and 37(1)). Section 37 of the present Act is deleted, and in its place amendments to The Dependants' Relief Act set out the relationship between a dependants' relief application and a matrimonial property application.

PART IV
AGREEMENTS BETWEEN SPOUSES

Contracting
out of Act

42.-(1)

Subject to section 42, where spouses have before or after marriage entered into and signed an agreement that provides for the possession or distribution of matrimonial property, the rights of the spouses in respect of that property shall be determined in accordance with the agreement.

(2)

On application by a spouse who is a party to an agreement referred to in subsection (1), a court may make an order for the possession or vesting of matrimonial property in accordance with the terms and conditions of the agreement.

Validity of
agreements

43.-(1)

Where a spouse has not, prior to signing an agreement referred to in subsection 41(1), obtained independent legal advice as to the nature of the agreement and its effect on the rights of the spouses under this Act, the court shall not give effect to the agreement if at the time it was entered into it was substantially unfair.

(2)

Where both spouses have, prior to signing an agreement referred to in subsection 41(1), obtained independent legal advice as to the nature of the agreement and its effect on the rights of the spouses under this Act, the court shall not give effect to the agreement if at the time it was entered into it was substantially unfair and was obtained by one spouse having taken unfair advantage of the ignorance, need or distress of the other spouse.

(3)

Subject to subsections (1) and (2), the validity of an agreement between spouses that provides for the possession or distribution of matrimonial property is governed by the law applicable to contracts generally.

PART V

AGREEMENTS BETWEEN SPOUSES

Section 42.

The provisions respecting agreements between spouses have been substantially recast. The special category of "interspousal contracts" is not retained, but the proposed Act still permits spouses to contract out of the Act. If an agreement signed by both spouses meets the validity requirements in section 43, then the possession or distribution is determined in accordance with the agreement. (See the discussion at pages 86-91 of this report.)

Subsection 42(2) adopts section 42 of the present Act; a spouse may apply to the court for an order vesting the property in accordance with the agreement.

Section 43.

Section 43 is new. Subsections 43(1) and (2) set out the criteria for determining the validity of agreements. If the spouses have each obtained independent legal advice, the contract may be set aside only on traditional contractual grounds. Where the ground is unconscionability, the spouse must demonstrate both a large inequality of exchange combined with inequality of bargaining power. If the spouses have not obtained independent legal advice then the inequality of bargaining power will be presumed so that the court may alter the contract if it considers it to be "substantially unfair".

Subsection 43(3) confirms that, except as provided by subsections (1) and (2), the general law of contracts is applicable to agreements between spouses.

Certificate
of independent
legal advice

44.-(1)

A certificate in Form G signed by a barrister and solicitor of Saskatchewan stating that a spouse, apart from the other spouse and prior to signing the agreement, has been advised by the barrister and solicitor as to the nature of the agreement and its effect on the rights of the spouses under this Act, is conclusive evidence that the spouse named in the certificate has obtained independent legal advice.

(2)

A barrister and solicitor who acts for both spouses with respect to an agreement that provides for the possession and distribution of matrimonial property can not give independent legal advice to either spouse as to the nature of the agreement and its effect on the rights of the spouses under this Act.

Other
agreements

45.

Where spouses have entered into an agreement, oral or otherwise, other than an agreement that under this Part determines the rights of the spouses in respect of matrimonial property, the court may, in any proceeding under this Act, give the agreement whatever weight it considers reasonable.

Section 44.

Section 44 is new. Subsection 44(1) provides a convenient method for establishing that there has been independent legal advice.

Subsection 44(2) makes it clear that a lawyer cannot draw up an agreement while acting for both spouses and then purport to give independent legal advice to one of the spouses. The provision prevents a conflict of interest. If only one lawyer is involved in drawing up the agreement, that lawyer must make it clear from the outset that he or she is acting for only one of the spouses, and direct the other spouse to obtain independent legal advice.

Section 45 .

Section 45 provides that agreements that are not signed by the spouses generally have no binding effect, though they may be considered by the court in making an order under the Act. This is substantially the same as section 40 of the present Act.

DELETIONS

Subsection 38(3) of the present Act provides that any provision that is void is severable. This is deleted in favour of the ordinary rule that severability will be determined by the interdependence of the promises. Section 39 of the present Act deals with void marriages. This is covered by section 48 of the proposed Act. Section 41 of the present Act is a transition rule. Because the proposed Act does not look to the formalities but at whether there was independent legal advice, the provisions respecting agreements should apply to agreements entered into prior to the coming into force of the proposed Act. This is implemented in section 53 of the proposed Act.

PART V

GENERAL

Common law
preserved

46.-(1)

Except in proceedings under this Act and except as provided in subsection (2), nothing in this Act alters the common law or rules of equity respecting the ownership of property between spouses.

(2)

No surviving spouse may bring or maintain a proceeding against the personal representative of the deceased spouse to enforce an implied, resulting or constructive trust.

Third party
interests

47.-(1)

Where it appears to the court that a person other than the spouses may have a claim to matrimonial property by trust, contract or otherwise, the court may order that the person be served with notice of the application or be made a party to the application.

(2)

Where a person referred to in subsection (1) is an infant or a mentally incompetent person, the public trustee may apply to be joined as a party; and the court may at any time during the proceedings, whether or not an application has been made by the public trustee, order that the public trustee be joined as a party.

Rights where
marriage
void

48.

Nothing in this Act confers a right on a spouse who at the time of marriage knew or had reason to believe that the marriage was void.

Minors

49.

A minor who is a spouse has the capacity to commence, conduct and defend proceedings under this Act without the intervention of a next friend or guardian ad litem, and may enter into an agreement with the other spouse in respect of the possession or distribution of matrimonial property and give any consent required or authorized by this Act.

PART V

GENERAL

- Section 46. Subsection 46(1) reaffirms the concept of "deferred sharing"; property rights are not created by the statute unless and until an order for distribution is made. Sections 43 and 52 of the present Act allude to deferred sharing, but in an ambiguous manner.
- Subsection 46(2) is new. It provides that a surviving spouse cannot bring an action to enforce an implied, resulting or constructive trust. When both spouses are living, a claim by one to an interest in property owned by the other under trust law may be countered by an application under matrimonial property legislation. Since a personal representative cannot bring a matrimonial property application, a surviving spouse could, in the absence of subsection 46(2), assert a claim under either matrimonial property legislation or trust law. Distribution of matrimonial property should generally be determined under matrimonial property legislation. However, because the Act establishes a deferred sharing regime, it should be possible to assert a claim to matrimonial property under trust law in a dispute concerning property between spouses and third parties. Subsection 46(2) therefore applies only to post-death applications.
- Section 47. Section 47 encompasses sections 45 and 48 of the present Act. Note that notice to the public trustee required by section 48 is no longer necessary, since such notice is also required under The Public Trustee Act.
- Section 48. Section 48 incorporates a principle contained in the present Act's definition of a "spouse".
- Section 49. Section 49 is substantially the same as section 46 of the present Act.

Court may
exclude
public

50.

In any proceeding under this Act, the court may exclude the public from all or part of the hearing, where the possible detriment to a spouse from disclosure of financial or personal matters outweighs the desirability of holding the hearing in public, and the court may prohibit the publication of any matter connected with the application or given in evidence at the hearing.

Appeal

51. -(1)

An appeal lies to the Court of Appeal from any order or judgment made under this Act.

(2)

On an appeal under this section, the Court of Appeal shall, if it considers the result at trial unfair, substitute such order as will in its opinion create a fair result.

Costs

52.

On an application for distribution of matrimonial property, the court shall order that the spouses each bear their own costs unless in the circumstances of the application it would be unfair to do so.

TRANSITION, REPEAL AND COMING INTO FORCE

Transition 53.

This Act applies notwithstanding that, before the coming into force of this Act:

- (a) the spouses entered into marriage;
- (b) the spouses entered into an agreement that provides for the possession or distribution of matrimonial property;
- (c) the matrimonial property in issue was acquired; or
- (d) a proceeding to determine the rights as between the spouses in respect of matrimonial property was commenced

- Section 50. *Section 50 is substantially the same as section 47 of the present Act.*
- Section 51. *Section 51 is similar to section 55 of the present Act. Subsection 51(2) widens the Court of Appeal's ability to review the exercise of discretion. The broad discretion granted to the court should not prevent the Court of Appeal from developing and refining rules governing the proper exercise of the discretion.*
- Section 52. *Section 52 is new. A matrimonial property application is a mechanism for vesting property in accordance with the respective entitlements of the spouses; it bears little resemblance to an ordinary civil action where a plaintiff alleges a claim against a defendant. An order distributing matrimonial property will not always indicate that the issues argued at trial have been resolved in favour of the applicant spouse. For this reason, the ordinary rule that costs should follow the cause should be replaced with the general rule that each party should bear its own costs.*
- Section 53. *Section 53 is similar to section 3 of the present Act. The proposed Act applies to all applications heard after its coming into force, but it will not have any retroactive effect upon property divisions already concluded.*

Rev. Stat.
c.H-5, Rev.
Stat. c.M-5,
Rev. Stat.
c.M-6.1
repealed

54.

The Homesteads Act, The Marriage Settlement Act, and The Matrimonial Property Act are repealed.

55.

This Act comes into force on a day to be fixed by proclamation of the Lieutenant Governor.

Section 54.

The Marriage Settlements Act provides for the registration of marriage settlements (ante-nuptial agreements under which a spouse is granted property by the other spouse or by a third party). The Act is premised on an outdated theory of unsecured credit granting, and, in any case, applies only to a small group of interspousal contracts. The protection afforded by the Act is slight. In addition, the registration requirement might well be regarded as an unwanted invasion of privacy. For these reasons the Act should be repealed. See the discussion of The Marriage Settlements Act in the Commission's Tentative Proposals for an Equality of Status of Married Persons Act, May, 1981, at 50-56.

DELETIONS

Sections 44, 49, 53, 57 and 58 of the present Act have all been deleted. The sections are unnecessary because the court already possesses the powers purportedly conferred by those sections.

Section 50 of the present Act has been deleted. The presumptions of advancement and of resulting trust are discussed in the comments to the proposed amendment to the proposed Equality of Status of Married Persons Act.

Finally, the regulation-making power in section 59 of the present Act has been deleted. The structure of the Act does not require regulations.

SCHEDULE

FORM A
(Clause 12(2)(a))

CONSENT OF SPOUSE

I, A.B. (name of spouse), spouse of the within named C.D. (name of other spouse), consent to the transaction set forth in the within instrument.

Signed by the above named)
A.B. in the presence of)
_____) Signature
_____)

I, (name of witness), of _____ in the Province of _____, make oath and say:

1. That I was personally present and did see A.B., named in the within consent, who is personally known to me to be the person named therein, duly sign and execute the same for the purposes named therein;

2. That the same was executed at _____, in the Province of _____, and that I am the subscribing witness thereto.

Sworn before me at _____)
_____, in the Province of _____)
_____, this _____ day) Signature
of _____, 19____.)
_____)
_____)

FORM B
(Clause 12(2)(b))

AFFIDAVIT OF SPOUSE

I, A.B., of _____, in the Province of _____, make oath and say:

1. That I am the maker (or, one of the makers) of the within instrument.

2. That I am the spouse of C.D., of _____, in the Province of _____;

3. That the consent of my spouse to the within instrument is not required under the terms of an agreement between myself and my spouse, which agreement bears date the _____ day of _____, 19____, and was signed by my spouse after obtaining independent legal advice as to the nature of the agreement and its effect on the rights created by The Matrimonial Property Act, 1984.

Sworn before me at _____)
in the Province of _____)
_____, this _____ day of _____) Signature
_____, 19____.)
_____)
_____)

FORM C
(Clause 12(4)(b))

AFFIDAVIT

I, A.B., of _____, in the Province of _____, make oath and say:

1. That I am the maker (or, one of the makers) of the within instrument.

2. That to the best of my knowledge, information and belief, no part of the land described in the within instrument is my matrimonial home under The Matrimonial Property Act, 1984.

Sworn before me at _____)
in the Province of _____)
_____, this _____ day of _____) Signature
_____, 19____.)
_____)
_____)

FORM D
(Subsection 16(1))

MATRIMONIAL HOME CAVEAT

To the Registrar of the _____ Land Registration
District:

Take notice that I, A.B., of _____, in the
Province of _____, spouse of C.D., of _____, in the
Province of _____, claiming that:

(here describe the land and refer to certificate of title)

is or includes the matrimonial home in which I have a right
to possession under Part I of The Matrimonial Property Act,
1984, forbid the registration of any transfer or other
instrument affecting such land or the granting of a
certificate of title thereto except subject to the claim
herein set forth.

My address in Saskatchewan is:

Dated this _____ day of _____, 19____.

Signature of Caveator or Agent

I, the above named A.B. (or C.D., agent for the above
A.B.), of _____, in the Province of _____, make oath
and say:

1. That the allegations in the above caveat are true in
substance and in fact, to the best of my knowledge,
information and belief.

2. That I am not (or the said A.B. is not to the best
of my knowledge, information and belief) maintaining any
other matrimonial home caveat in the Province of
Saskatchewan.

Sworn before me at _____)
_____ in the Province of _____)
_____, this _____ day of _____)
_____, 19____.)
_____)
_____)
_____)

Signature

FORM E
(Subsection 16(2))

WITHDRAWAL OF MATRIMONIAL HOME CAVEAT

To the Registrar of the _____ Land Registration District:

I, A.B., of _____, in the Province of _____, hereby withdraw the matrimonial home caveat made by me under The Matrimonial Property Act, 1984, which matrimonial home caveat bears date the _____ day of _____, 19____, and was registered in the Land Titles Office for the _____ Land Registration District on the _____ day of _____, 19____, as instrument No. _____.

Dated this _____ day of _____, 19____.

Signed by the above named)
A.B. in the presence of)
_____)
_____)

Signature

I, (name of witness), of _____, in the Province of _____, make oath and say:

1. That I was personally present and did see A.B., named in the within withdrawal of matrimonial home caveat, who is personally known to me to be the person named therein, duly sign and execute the same for the purposes named therein.

2. That the same was executed at _____, in the Province of _____, and that I am the subscribing witness thereto.

Sworn before me at _____,)
_____, in the Province of _____)
_____, this _____ day of _____)
_____, 19____.)
_____)
_____)

Signature

FORM F
(Subsection 17(2))

NOTICE TO MATRIMONIAL HOME CAVEATOR

To: A.B. (name of caveator)

Take notice that the matrimonial home caveat made by you under The Matrimonial Property Act, 1984, which caveat bears date the _____ day of _____, 19____, and was registered in the Land Titles Office for the _____ Land Registration District on the _____ day of _____, 19____, as instrument No. _____, against the title to the following land:

(here describe the land and refer to certificate of title)

will lapse and be discharged from the title to the land unless within thirty days of service on you of this notice you file with the Registrar of the Land Titles Office for the _____ Land Registration District an order of the court continuing the matrimonial home caveat.

Dated this _____ day of _____, 19____.

Signature of spouse of caveator

Address for Service: _____.

FORM G
(Subsection 44(1))

CERTIFICATE OF INDEPENDENT LEGAL ADVICE

I, _____, of _____, in the Province of Saskatchewan, a barrister and solicitor of Saskatchewan, certify that the within named A.B., of _____, in the Province of _____, being the spouse of C.D., of _____, in the Province of _____, also named in the within agreement, has been advised by me as to the nature of the within agreement and its effect on the rights of the spouses under The Matrimonial Property Act, 1984, and that

the agreement was signed by the said A.B. after receiving such advice.

AND I further certify that I have not acted for the said C.D. with respect to the agreement.

DATED this _____ day of _____, 19____.

Signature

PROPOSED CONSEQUENTIAL
AMENDMENT OF THE DEPENDANTS' RELIEF ACT

An Act to amend The Dependants' Relief Act

- | | | |
|--|---------|---|
| Short title | 1. | This Act may be cited as <u>The Dependants' Relief Amendment Act, 1984.</u> |
| Rev.Stat.
c. D-25 | 2. | <u>The Dependants' Relief Act is amended in the manner set forth in this Act.</u> |
| Subsection 9(2)
repealed | 3. | Subsection 9(2) is repealed. |
| New section
15.1 | 4. | The following section is added after section 15: |
| Application stayed where distribution of matrimonial property sought | 15.1 | Where an application is made by a surviving spouse for distribution of matrimonial property, any application under this Act shall, unless the court orders otherwise, be stayed until the application for distribution of the matrimonial property has been finally determined. |
| Section 19 amended | 5. | Subsection 19(1) is repealed and the following substituted: |
| Power of court to discharge or vary order | 19.-(1) | The court may at any time discharge, vary or suspend an order made by it or make such other order as it thinks just in the circumstances, on the grounds that:

(a) a relevant fact was not disclosed to the court when the order was made; or

(b) an order distributing matrimonial property to the surviving spouse has been made subsequent to the order made under this Act. |

Coming into
force

6.

This Act comes into force on the day The
Matrimonial Property Act, 1984 comes into
force.

COMMENTARY

Subsection 9(2) of The Dependents' Relief Act provided that if a wife's need is established, the court must award at least the amount she would have obtained on an intestacy. This provision does not accord with the maintenance objectives of the Act. It appears to be a mechanism for distributing property between a surviving spouse and an estate. As such, it has been superseded by The Matrimonial Property Act. Furthermore, because it applies to wives but not husbands, subsection 9(2) would likely violate the guarantee of equality rights in the Canadian Charter of Rights and Freedoms when section 15 comes into force in 1985.

Proposed section 15.1 makes it clear that a matrimonial property application must be decided before a final dependants' relief order is made. The dependants' relief application is based on the need of a spouse, and therefore a property division is often of great relevance because it may reduce or eliminate the spouse's need.

Proposed subsection 19(1) provides that if a dependants' relief application has been determined prior to the matrimonial property application, the court may vary the dependants' relief award in light of the property division.

A dependants' relief application under section 15.1 or an application for variation under subsection 19(1) may therefore be brought concurrently with a matrimonial property application, and be determined after the property division has been decided.

PROPOSED CONSEQUENTIAL AMENDMENT
OF THE QUEEN'S BENCH ACT

An Act to amend The Queen's Bench Act

- | | | |
|---|----|--|
| Short
Title | 1. | This Act may be cited as <u>The Queen's
Bench Amendment Act, 1984.</u> |
| Rev. Stat.
c. Q-1
sections 34
to 36 repealed | 2. | Sections 34 to 36 of <u>The Queen's
Bench Act</u> are repealed. |

COMMENTARY

Sections 34 to 36 of The Queen's Bench Act apparently permit a court to settle matrimonial property on a spouse, and interfere with marriage settlements in certain cases. These sections are based on concepts of law that pre-date The Married Women's Property Act. They appear to allow a husband to attack a marriage settlement in favour of a wife on the basis that she was at fault for the marriage breakdown. These provisions are archaic and should have been repealed long ago.

PROPOSED CONSEQUENTIAL AMENDMENT
OF THE INTESTATE SUCCESSION ACT

An Act to amend The Intestate Succession Act

Short
title

1. This Act may be cited as The Intestate Succession Amendment Act, 1984.

Rev.Stat.
c. 1-13, new
section 4.2

2. The Intestate Succession Act is amended by adding the following section after 4.1:

- 4.2-(1) If an intestate dies leaving a spouse and issue, his estate, when the net value thereof does not exceed \$100,000.00, shall go to his spouse.
- (2) Where the net value exceeds \$100,000.00, the spouse shall be entitled to \$100,000.00 and shall have a charge upon the estate for that sum, with legal interest from the date of the death of the intestate.
- (3) Of the residue of the estate, after payment of the said sum of \$100,000.00 and interest:
- (a) where the intestate dies leaving a spouse and one child, one half shall go to the spouse;
- (b) where the intestate dies leaving a spouse and children, one third shall go to the spouse.
- (4) If a child has died leaving issue and such issue is alive at the date of the intestate's death, the spouse shall take the same share of the estate as if the child had been living at that date.

- (5) This section applies only to the estates of those persons dying on or after the day that The Matrimonial Property Act, 1984 comes into force.

Coming into
force

3.

This Act comes into force on the day The Matrimonial Property Act, 1984 comes into force.

COMMENTARY

Section 4.2 increases a surviving spouse's preferential share to \$100,000. This change is discussed at pages 80-82 of this report.

REVISION OF THE PROPOSED EQUALITY OF
STATUS OF MARRIED PERSONS ACT

The following section is added to the proposed Equality
of Status of Married Persons Act:

In questions dealing with the ownership of
property between spouses or between a parent
and child, there shall be applied a
presumption of advancement with respect to the
property.

COMMENTARY

Section 50 of the present Act abolishes the presumption of advancement in questions between spouses, and replaces it with a presumption of resulting trust. There is an exception where property is placed in the joint names of spouses. In this case there is a presumption of a one-half beneficial interest.

The function of these presumptions has been greatly restricted by matrimonial property legislation. Under matrimonial property legislation the title is irrelevant: the court can make orders dividing property irrespective of title. Presumptions of ownership are therefore only relevant in questions where third parties are involved. In most cases it will be creditors that are attempting to find exigible property of the debtor to satisfy their judgments.

In practice, the execution creditor does not rely on the presumptions. The execution creditor is primarily concerned with identifying property in the name of the debtor. Transfers intended to defeat creditors will also be identified and attacked under fraudulent conveyances legislation. A presumption of resulting trust would make such an inquiry even more uncertain.

It is far more practical to apply a presumption of advancement to transfers between family members. The beneficial interest is presumed to be in the person who possesses the legal title. If it is alleged that the transfer improperly defeats creditors, then it may be impugned under fraudulent conveyance legislation.

Finally, although the present Act applies the same presumption to transfers from husband to wife as it does for transfers from wife to husband, there is still a presumption of advancement when a father transfers property to a child, but a presumption of resulting trust when a mother transfers property to a child. This inconsistency should not be allowed to remain in the face of section 15 of the Canadian Charter of Rights and Freedoms. In both cases there should be a presumption of advancement. Because this change goes beyond considerations relevant to matrimonial property, it is best placed in the proposed Equality of Status of Married Persons Act.